

23.2.14

ARGUMENTS,
AND
DECISIONS,

In REMARKABLE CASES,

Before the High Court of JUSTICIARY, and
other SUPREME Courts, in SCOTLAND.

41.5.88

Collected by Mr MACLAURIN.



*Sit mihi fas audita loqui, sit numine vestro
Pandere res alta nocte et caligine mersas.*

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MDCCLXXIV.

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A R G U M E N T S P R E F A C E

MY original intention was to publish only a few simple and leading cases, which I had either collected or particularly selected. But it having been observed that I should extend my observation to a much greater number of animal cases, I was soon convinced it would be proper to include this country but few trials have been printed, and it is not yet appeared on its criminal law; and it is not known of the court of judicature, the only source from which of this law can be derived: I was therefore obliged to select a section would contribute not a little to the advancement of science, and be useful also to many gentlemen who are called upon by the profession to give assistance.

Better I was apt to believe it would be of service to many, not prompted either by protection or to pursue it. Comports and struggles of all sorts should be committed to mankind. Hence many write themselves with the simplicity of hard words do not put aside beyond the criminal law, criminal cases few of which are known to any person of education may justly claim a more general attention: for no sum of money, no portion of land, can give rise to a judicial contest, equally interesting with that in which the life or liberty of a man is at stake.



In consequence of these considerations, I relinquished my first scheme, and resolved to adopt a number of criminal cases. As the work grew, so did my desire of rendering it complete. Hence instead of being miscellaneous, as was at first intended, it is now wholly occupied by cases that are all of one class: it corresponds, not, therefore, exactly with the title; a defect that may perhaps be supplied by another volume, if this one meets with a favourable reception.—From the same source I extracted the

P R E F A C E.

MY original intention was to publish only some few remarkable and leading cases, which I had either argued, or attended to particularly. But it having been suggested, that I should extend my observation to a much greater number of criminal cases, I was soon convinced it would be proper to do so. In this country but few trials have been printed; no treatise of merit has yet appeared on its criminal law; and it is irksome to search the record of the court of justiciary, the only source from which a knowledge of this law can be derived: I was persuaded, therefore, that such a collection would contribute not a little to the advancement of jurisprudence, and be useful also to many gentlemen not bred to the law, who are called upon by the constitution to serve as jurymen.

Besides, I was apt to believe it would be acceptable to many, not prompted either by profession or duty, to peruse it. Combats and struggles of all sorts afford entertainment to mankind. Hence many amuse themselves with civil cases when a multiplicity of hard words do not put these beyond their comprehension. If so, criminal cases, few of which are unintelligible to any person of education, may justly claim a more general attention: for no sum of money, no portion of land, can give rise to a judicial contest, equally interesting with that in which the life or liberty of a man is at stake.

In consequence of these considerations, I relinquished my first scheme, and resolved to adopt a number of criminal cases. As the work grew, so did my desire of rendering it complete. Hence this collection, instead of being miscellaneous, as was at first intended, is almost wholly occupied by cases that are all of one class: it corresponds not, therefore, exactly with the title; a defect that may perhaps be supplied by another volume, if this one meet with a favourable reception.—From the same motive, I travelled through

two voluminous, though but partial abridgements of the record; the one from 1536 to 1674, the other from 1694 to 1730. These produced the Introduction to this collection, and great part of the notes subjoined to it; but it was from the record, or papers given in to court, that all the cases in the collection itself were excerpted*.

I have seldom taken notice of any trial that has been printed, except when I could offer something relative to it that had not been published.

I have omitted too almost all the cases of treason, for this among other reasons, that never (it is to be hoped) again, at least not for ages, will there be any occasion to consult them.

I have altogether neglected, or but slightly touched upon, several other titles, though there are a number of old cases in the record belonging to each of them. This I did, because these cases have been rendered almost totally useless; some by dint of British statutes, others by the imperceptible, but powerful influence, of a change in opinions and manners. I have not, however, put a negative upon every case of mere curiosity; but the collection chiefly consists of great constitutional questions, or of trials for those crimes, which, as they spring from the passions or appetites of men, and are incompatible with the very being of society, must in every age be frequently committed and prosecuted.

I have in several cases given the papers at large; sometimes be-

* Save the argument in N^o 91. which is stated as in the abridgement last mentioned, with a little variation in the expression. Each of these abridgements fills three volumes in folio. There is a copy of the first in the Advocates library. It seems to be, at least part of it, the work of Lord Royston, who was one of the judges. There are many occasional observations in it, which shew the author was well acquainted with our criminal law and practice. The other is by a learned lawyer lately deceased; but he makes no remarks. In my references to these works, *MS. Abst.* stands for the first, *Abridg.* for the other.

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cause they were of the last importance, sometimes because I found it would be extremely difficult to abridge without injuring them, and sometimes, when not very prolix, to shew the different manner of writing at different periods. The papers of the present age will suffer no disgrace from a comparison with those of the past; and it gives me pleasure to reflect, that though this work, from its nature, can confer no reputation upon me, yet it may serve to prolong, if not perpetuate, the fame of my contemporaries: for the most elaborate arguments, those even upon which attention has been wearied, and genius exhausted, if not embodied in such a collection, must be content with a fugitive duration and momentary praise.

The notes of the opinions of the judges, on some of the later cases, were either taken by myself, or by other lawyers. They are all very imperfect, from our ignorance of short-hand; and it would be injurious to suppose they were delivered from the bench as incorrectly and incoherently as here inserted. It was an easy matter to have moulded them into a better form; but I thought it more eligible to exhibit them in their rude and rugged state, as it in some measure proves their authenticity, than expose *that* to suspicion, by giving them a polish. They will notwithstanding, I imagine, be acceptable, as every intelligent reader must receive great satisfaction, even from a sketch of the ground on which the court proceeded in determining difficult or momentous cases.

As to the style of this work, it will, I hope, be thought sufficiently perspicuous, so far as I am answerable for it. Brilliancy, or even elegance of expression, ought not to be expected in any part of it. An English counsel observed some years ago, "That the Scotch lawyers write all they speak, and print all they write." This was not only smartly but truly said; and as writing much, and very fast, must spoil the best hand that ever came from the school to the office; so dictating volumes in a hurry, must spoil the best style that ever was brought from the college to the bar.

I have explained when I could, and when it seemed necessary to do it, the technical terms, and obsolete words, of which there must be a multitude in a work of this kind. It must abound, too, in Scotticisms: of these it might have been weeded, and pure English put in their place; but I was afraid the improvement would not repay the cost requisite to make it; and besides, that it could not be accomplished, without giving to the whole an air of affectation; which, in my apprehension, must be no less disadvantageous to a book, than it is to a character.

There are but a hundred cases in this collection distinguished with numbers; but in the arguments, in the Introduction, and in the Notes, many more will be met with. It contains, too, several papers of value, which it required particular opportunities, and some pains, to procure. It is, however, after all, extremely defective; but having found upon inquiry, that nothing in this way had been, or probably would be, undertaken by any other person, I thought it expedient to publish this work, such as it is, because almost every trial makes it evident, that something of this kind is very much wanted.

There is but little in this bulky volume that can, properly speaking, be called mine. I have proposed but few alterations on our criminal law or forms, and presumed to give an opinion but upon two or three striking cases, contenting myself, as to the rest, with stating them impartially. I can pretend, therefore, to no other merit, than that of having taken some little trouble to increase the public stock of valuable knowledge. That, I am pretty confident, this work, though incomplete, will in some measure do: For that, I cheerfully submitted to be the transcriber of judgements frequently unjust, the abridger of arguments often absurd, and the sad historian of dooms and executions.

Edinburgh, May 14. 1774.

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† The Note on this Case is in p. 774.

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Remarkable

Remarkable Cases, which are either not stated at all, or but shortly, in this collection, because the trials are printed.

Case of Captain Green, and others, tried for murder and piracy before the court of Admiralty in 1705.

Case of Carnegie of Finhaven, tried for murder before the Justiciary in 1728.

Case of Captain Porteous, tried for murder before the Justiciary in 1736.

Case of Archibald Stewart, tried before the Justiciary in 1746, for neglect of duty in 1745, when Lord Provost of Edinburgh.

Case of James Stewart, tried for murder before the circuit at Inverary in 1752.

Case of Macdonald of Barisdale, an attainted person, in 1754.

Case of Lieutenant Patrick Ogilvie and Katharine Nairne, tried for incest and murder before the court of justiciary in 1765.

Case of Helen Watt and William Keith, tried for murder before the circuit at Aberdeen in 1766*.

Case of Mungo Campbell, tried for murder before the court of Justiciary in 1770.

This collection takes notice of very few cases that are stated in any printed law-book, or in the information for Finhaven, and other remarkable papers.

* An argument is prefixed to this trial on the nature of circumstantial evidence, and some other particulars. There is an answer to it, which deserves to be read, in the magazine called *The Scots Magazine*, 1767, p. 479.

E R R A T A

- Introd. p. xxxiii. l. 2. of the note, for relevany, r. relevancy,*
Crim. Cases, p. 5. l. 4. from the bottom, for her r. his
P. 12. l. 4. for Aiken r. Aikenhead
P. 57. l. ult. of the summary, delete a
P. 152. l. 4. from the top, for " he obtained a pardon," &c. r. " he
" obtained permission to return to this country for a limited time;
" upon expiry of which, having been ordered away, he retired to
" France, and there died."
P. 173. in the note, for See the case of Black, &c. r. See p. 725.
P. 417. l. 10. from the bottom, for Christiana r. Christianus
P. 528. l. 14. from the top, for a man r. as a man
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P. 725. l. 4. from the bottom, for he r. she
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P. 755. l. 6. for viriginis r. virginis

INTRO-

[This leaf to be bound in between the *Errata* and the *Introduction*.]

A D D E N D A.

N^o 15. *Case of Robert Carmichael Schoolmaster, p. 17. l. 7. after trust,*
add, — The prosecutor, January 1. 1700, made a further explanation, or declaration. To which the pannel at first objected, That it was in effect a new libel; but afterwards he judicially agreed, that the relevancy should be determined upon it as a libel. This charges the pannel with the murder of the deceased; in so far as the pannel, having been schoolmaster to the defunct, was obliged to treat him with affection, and to have exercised discipline towards him, when necessary, with due moderation; likeas, which is alledged *informative*, the pannel was particularly advertised for that effect; yet, nevertheless, in his unaccountable malice and cruelty, under pretext of discipline, he did whip and scourge the deceased, with that extreme severity, and three times, *ex incontinenti*, that by severe lashing, not only on his hips, but also on his back, and beating him on the head and back with the shaft of a whip, his head swelled, and blae [livid] marks were found on his head and back; that he had dragged the deceased; who, after crying *God's mercy!* expired; at least, so soon as he was let go by the pannel, and had staggered weakly to his seat, he never spoke more; but, through the cruel tyranny of the pannel, breathed out his last, and was carried dying, if not dead, out of the school. The court found the indictment, as declared, relevant to infer the pains of death; and found any of the qualifications libelled, death immediately following, relevant *separatim* to infer an arbitrary punishment. — The jury found it proven, That the pannel hath transgressed the admonitions of necessary and moderate discipline, given him by William Douglas of Dornock, father to the deceased John Douglas scholar

scholar at Moffat; as also found it proven, That the pannel did, three times, *ex incontinenti*, severely and cruelly lash and whip the defunct upon the back and hips, and in rage and fury did drag him from his desk, and beat him with his hand upon head and back with heavy and fore strokes, and after he was out of his hands he immediately died; and found it likewise proven, That after the defunct's death, the side of his head was swelled, and blae marks seen thereupon, with several marks of stripes from the small of his back to his thighs.

N^o 18. *Case of Bisset and Currier*, p. 19. l. 6. after wife. read as follows. — The jury found the libel proved by one witness against William Bisset *nemine contradicente*; and, with a cumulative probation, found, That the powder found in the defunct's stomach was the occasion of her death. Likewise found the libel proven against Jean Currier by her own judicial confession.

INTRODUCTION TO THE CRIMINAL CASES.

§ 1. *Of the record.*

THE Advocates library is in possession of the most ancient criminal record of this country now extant. It commences 7th November 1493, and ends 3d August 1504. It contains little more than a very short account of the sentences pronounced by the circuit-court at different places *ex parte australi aque de Forth*, setting forth neither the indictments, the evidence, or the verdicts, but merely, that such and such persons were *convict*. and *susp.* or *de-collat.* that is, hanged or beheaded.

The most ancient record of the court of justiciary commences 12th July 1536. From 1589, the record is generally in the Scotch language; before that, generally in Latin. Several parts of the old record are blotted out; and the margin bears, "De mandato S. D. N. Regis, et sui Therii (Thesaurarii) per precept. eor. manib. subscript." *

The depositions of the witnesses are for the first time recorded 14th February 1615; but they are not signed either by the witnesses or judges.

The depositions continued to be taken down in writing in all ca-

* 5th November 1600. In the case of Francis Tenant, tried for writing two seditious letters under a feigned name, the letters were produced against him. But it is marked on the margin of the record, that the Advocate took them up, and would not have them inserted in the process. *MS. Abst. i. 205.*

ses till 1748; when, by 20^o Geo. II. recording the evidence was dispensed with, excepting in capital cases.

What is called the *Record*, or *Books of Adjournal* *, is really no more than a fair copy, not being authenticated by the subscription of any person. The book in which the depositions, confessions, sentences, &c. are taken down, and signed by the witnesses, parties, and judges, is called the *Scroll-book* †.

Till 1600, the year was computed from the 1st March; but an act of council, 17th December 1699, ordered it to be computed from 1st January ‡.

§ 2. *Of the powers of the assize or jury.*

THE powers of the jury were as extensive anciently as they are now. The court gave judgement upon dilatory defences when offered; and if clear that the libel was irrelevant, they dismissed it; if not, they admitted it to proof, or remitted the pannel to the knowledge of an assize, and sent the whole case to them, being of opinion, that it was the proper province of the jury to determine, upon consideration of the whole circumstances ||.

Accordingly
* *Adjournare, adjurnare, diem dicere, alicui, citare, in jus vocare, vox forensis, Gallice adjourner, Angli pro comperendinare, vadari, in ulteriorem diem ponere, usurpant, Gallice remettre à un autre jour. Du Cange.*

† The same probably with that anciently called the *Minute-book of Adjournal*, taken notice of in MS. Abf. i. 116.

‡ MS. Abf. i. 188.

|| Thus in the case of Maxwell of Gribton for murder, 21st June 1605, several defences *in jure* having been offered for the pannel, the justice “repelled them *loco quo*, reserving the pannel’s information thereof to the assize.” MS. Abf. i. 219. *in fine*.—And in the case of John Stewart for murder, 24th December 1609, it having been pleaded for the pannel, That the libel was not relevant, because it acknowledged, that the deceased had lived seventeen months after receiving the wounds libelled, the justice “refers the whole matter to the assize.” *Ibid.* p. 281.—In the similar

case

Accordingly the most ancient style of verdicts was, Guilty, or Not guilty. These indeed were not the very words; but expressions equally significant were used. If the jury thought the prisoner guilty, they found him *fylyt*, (foul'd), *culpable*, and *convict*. If innocent, they found him *clensit*, or *acquit*. This style continued, with a little variation in the spelling, down to the Usurpation, when the words *Clean*, and *Guilty*, were adopted. Soon after the style came to be Guilty, or Not guilty; and this continued till towards the close of Charles II.'s reign. In the case of Mr John Mitchell, tried for assassination, 10th January 1674, the jury found certain parts of the libel proved, *conform to the Lords interlocutor*. And in the case of Arthur, for treason, 9th January 1682, the jury found the libel *pro-*
ven *.

By
case of Carrisden, 10th January 1616, "the justice ordains the matter to pass to the knowledge of an assize, and them to take cognition therein, as they think guide, for the further resolution of their consciences." *Ibid.* p. 296. In the case of John Meldrum, indicted for burning the tower of Frendraught, 2d August 1633, it was argued by the counsel for the prisoner, "That the libel was not relevant, the same being founded on presumptions only." Answered by the Advocate, "Whether these be sufficient, or not, it lies before the jury, and not to be considered by the judge; and if the judge shall think fit to take them into his consideration, the presumptions libelled are of that nature, that, if taken jointly, they are *vehementtissima*." Replied for the pannel, "The same is only pertinent to the judge; because the quality and import of the presumptions concerns the relevancy of the dittay, which the judge must determine, and ought not to be left to the jury."—"The justices and assessors having seen and considered the libel, with the defences, &c. find the dittay positively set down anent the fact and burning libelled relevant, and remits the same to the knowledge of an assize; and as concerning the evidence, presumptions, and arguments, set down in the said dittay, remits the same to be considered by the said assize, as only proper to them." *Ibid.* p. 253. 254.—The same objection was moved in the case of Margaret Hartside, May 1608, and over-ruled. But in process of time the court took upon them to declare, by their interlocutor, what circumstances would, if proved, afford sufficient ground to convict or acquit.

* Lord Roystoun, in his MS. notes on Mackenzie's Criminals, *ad* p. 253, expresses himself thus. "Verdict is either general or special. This last is, when they set

By this time the opinion which had been broached long before, that the jury were judges of the fact only, had gained ground; and an alteration in the manner of drawing indictments, which took place soon after the Restoration, contributed not a little to smooth the way for its progress.

Anciently libels or indictments were conceived in very general terms. While this practice continued, there could not well be a special interlocutor upon the relevancy; and the jury were apt to be confounded by circumstances coming out upon the evidence, as to the import of which no light had been given them, either by directions from the judge, or by the pleadings of the lawyers. In August 1662, Marion Lawfon was brought to trial for child-murder, upon a general indictment. It was found relevant, and remitted to a jury. They brought in a verdict, by which they "fand the pannel Marion Lawfon to be *cleaned*, and *not guilty* of the murder of the libelled child, in manner mentioned in the dittay, in respect of no probation; but, in respect of the presumptions, remit the pannel to the justices consideration." Upon this, the court considering, "That albeit, upon the 1st day of August instant, she was *cleanfed* be an assyze of the murder of her owne chyld; yett the assyze, be their verdict, remitted her to the justices consideration, in respect of the presumptions; therefore the said justice-depute" adjudged her to be whipped through the high-street of Edinburgh, and to be banished from the counties of Mid-Lothian and Lanerk, where she had committed the fact.

forth what points libelled are proven. The first is, when they either find, that the pannel is guilty, or not; which is the style of English verdicts. With us formerly was, Find the pannel fylit, culpable, and convict; or, that he is clean and acquit. But a new way was introduced in the end King Charles II. viz. That the libel is proven or not proven. The first of which I find is 9th January 1682, in the case of Arthur of Banahill, and Ure of Shingartoun, for treason, in being in the rebellion at Bothwell-bridge." In p. 248. he says, "I think the ancient style is much the best." He is mistaken in thinking the first verdict, finding proved, was in 1682.

Tradition

Tradition says, the jury thought this woman guilty, though they did not chuse to find her so: And indeed that such was their opinion is pretty plain from their verdict.

This put the Advocate upon drawing indictments more specially. In the case of Margaret Taylor, brought to trial for child-murder and adultery 24th June 1663, the libel set forth all the circumstances; and the interlocutor was, "The justice-depute sustains the dittay as it is libelled, as to the qualifications therein, relevant."

After this interlocutor there was no danger the jury would be staggered, as in the former case; because all the circumstances that could come out upon proof having been particularised in the libel, and the libel, as qualified, having been found relevant by the court, the jury had the interlocutor to guide them*. Accordingly they "found the pannel Margaret Taylor guilty of the crime of adultery, "and also of art and part of the murder mentioned in the dittay."

Such was the origin of special libels; and they gave rise to special relevancies, and to verdicts finding proved or not proved.

General verdicts, however, for the most part found guilty or not guilty, till the beginning of this century. From 1704, the style was always Proven or Not proven, till 1728. In that year, Mr Carnegie of Finhaven was brought to trial for the murder of the Earl of Strathmore. The court found, "That the pannel, at the time and "place libelled, having, by premeditation and forethought-felony,

* After stating the libel against Margaret Taylor, the abridger makes the following remark. "Observe here a sure way taken to prevent scruples that might arise before an assize for want of a positive probation of the murder. The pursuer libels all the presumptions, and the extrajudicial confession, whereupon he founds; which did put the justices to give their interlocutor upon the relevancy of that probation, as it was circumstantiate: and the justice-depute having found it so, the assize had nothing ado but to consider, whether these circumstances and presumptions were proven." *MS. Abst. iii. p. 93.*—And in the case of Betty Brymer for child-murder, 17th July 1693, after stating the libel, which was likewise very special, he observes, "This is the form of such libels; and the like was found relevant against Margaret Taylor, 24th June 1663. See my observe thereupon." *Ibid. p. 96.*

with

“ with a sword, or other mortal weapon, wounded the deceased
 “ Charles Earl of Strathmore, of which wound he the said Earl soon
 “ thereafter died, or that he the pannel was art and part thereof,
 “ relevant to infer the pains of law; but allowed, and hereby allow,
 “ the pannel to prove all facts and circumstances for taking off the ag-
 “ gravating circumstances of forethought and premeditation: As
 “ also fand, and hereby find, That he the said pannel, time and
 “ place foresaid, having, with a sword, or other mortal weapon,
 “ wounded the said deceased Earl, of which wound his Lordship
 “ soon died, or that he the pannel was art and part thereof, *separa-*
 “ *tim* relevant to infer the pains of law: And repelled, and hereby re-
 “ pel, the defences proponed for the pannel; and remitted, and
 “ hereby remit him, and the indictment, as found relevant, to the
 “ knowledge of an assize.”—But the jury, by a plurality of voices,
 found him *Not guilty*.

From what has been said, it appears, that in this case the jury did not assume a new power, as is generally believed, but only resumed a power that had anciently belonged to them, the exercise of which had been discontinued for some time.

§ 3. *Of the interlocutor on the relevancy.*

A Libel, or a defence, is said to be relevant, when the facts upon which it founds are sufficient to infer the conclusion *.

It was a rule anciently, that no defence could be admitted which was contrary to the libel. This, however, was soon softened, and such defences received as were not contrary to the essentials or prin-

* *Relevantes articuli, legitimi, validi, probantes.* Literæ Sexti IV. pp ann. 1481, pro conventu B. Mariæ de Bono-Nuncio Rotomag. ex archivo ejusdem Cænobii, et quia idem officialis quasdam positiones et articulas admissibiles et *relevantes*, pro parte priores et conventus prædictorum admittere recusavit, illosque per suam interlocutoriam rejecit, &c. Du Cange.—This term was probably first applied to the defence *Probatum non relevat*, as the primary signification of *relevare* is *levare, solari*. See Du Cange.

principal part of the libel: *e. g.* Self-defence was sustained against a libel for murder; because it does not contradict the principal allegation in the libel, viz. the killing; but the defence of *alibi* has been several times repelled. The rule was very unjust and improper; for this one of many reasons, that it made it an easy matter to draw a libel so as to exclude every defence *.

The practice of the court is, and for many years has been, not to find a special relevancy as to the libel and defences, but to pronounce a general interlocutor, finding the libel relevant; and allowing the pannel a proof of all facts and circumstances that tend to exculpate or alleviate, &c.

This practice crept in by degrees. In the case of Henderfons, brought to trial for oppression 14th January 1723, a special relevancy was found, and a defence was sustained as sufficient for eliding it: "and for *alleviating* the above relevancy, allow the pannels to prove, &c. and repel the haill other defences †." In the case of Thomas Sinclair, indicted, 7th December 1724, for insulting a judge, the court found his having insulted, or threatened, relevant to infer an arbitrary punishment; "but for *alleviating* the same, allowed the pannel to prove, that the injurious threatening and insults libelled, followed immediately upon the complainer's accusing the pannel of telling lying stories; and repelled," &c.

In the case of Honeyman of Gramesay, who was indicted, 29th November 1726, for being art and part of the murder of Captain Moodie, perpetrated by Sir James Stewart of Burray's brother, and servants, in October 1725, and for supine negligence as a judge, in not causing apprehend the murderers, the court found the first charge relevant to infer the pains of death, the second an arbitrary

* See Mackenzie's Criminals, tit. *Exculpation*, and Erskine's late Institute, p. 712. This rule was also followed long in civil cases; but in these it was much earlier got over, and a proof before answer of all facts and circumstances allowed.

† This is the first interlocutor I have met with, in which alleviation is mentioned.

trary punishment; "and allowed the pannel to prove *any fact* for "exculpating himself of either of the crimes libelled."

In other cases, however, afterwards, the old way was again followed.

In Finhaven's case above stated, 15th July 1728, he was allowed to prove *all facts and circumstances*; but only to a certain effect; which would not have availed him much, had the jury left the cause to the court.

In the case of Hamilton of Newton, tried for a battery, 18th November same year, a relevancy was found; "but for *extenuating* the "said crimes, allow the pannel to prove previous provocation; and "repel," &c.

In the case of Walter and George Boswalls, indicted, 17th December 1728, for invading and beating John Ferguson, the court found the beating and bruising, or their being art and part thereof, relevant; and allowed "to *both parties* to prove *all circumstances*, either for aggravating or alleviating the beating libelled; and repelled the haill other defences."

In some cases after this, the old method was again followed.

In the case of William Deans, for coining false money, 26th September 1729, the court found a special relevancy, "and repelled the "haill defences proponed for the pannel; but allowed him to adduce *what proof he can* for eliding any of the circumstances that "may be brought in evidence against him."

In the next case, of three gentlemen of the name of *Macintosh* for murder, 24th November 1729, the court found, That they, or either of them, having murdered the deceased, or they, or any of them, having been art and part of the murder, relevant to infer the pains of law; "but allow the pannels to prove *all facts and circumstances* "they can, for eliding the force of any part of the evidence that shall "be adduced against them, for inferring their guilt, or their being "art and part of the said crime."

In some subsequent cases, so great a latitude was not given. In

1736,

1736, Captain Porteous was allowed "to adduce *what evidence he*
 "could with respect to his *behaviour at the time* the forefaid crimes
 "are libelled to have been committed, for taking off the circumstan-
 "ces which should be brought for inferring his being guilty *."

In

* He complained, That this interlocutor circumscribed his proof too much; and
 alledged, he ought to have been allowed a proof "of all circumstances he judged
 "material for his defence."

It was answered, "1st, A proof at large cannot be allowed, consistent with the
 "rules established, in favour of the person who stands his trial. To check the wit-
 "nesses, and for the more thorough information of the jury, and to prevent, as
 "much as possible, the jury from returning verdicts contrary to evidence, all the de-
 "positions or examinations are entered upon record, signed by the witnesses, and
 "one of the judges. Counsel is allowed to plead for the defendant; which necessa-
 "rily take up so much time, that if the defendant was left at liberty to prove what
 "he pleased, human nature could not stand under the fatigue of a trial; and break-
 "ing off in the middle, and taking it by parts, is both contrary to law, and ex-
 "tremely dangerous."

"2^{dly}, The defendant is at liberty to offer what he pleases in his defence to the
 "court; and if he make it appear by his counsel, that it is material for him, the
 "court allows a proof. In the trial, the counsel for Captain Porteous insisted upon
 "circumstances previous, circumstances subsequent, and his behaviour during the
 "execution of Wilson. The circumstances previous, were the orders, said to be gi-
 "ven by the magistrates the day before the execution. Now the orders could be no
 "other, than to fire if it was necessary; and that he could have done without orders.
 "If they had ordered him to fire without necessity, such apparent unlawful order
 "could not defend him."

"If the magistrates had upon the spot given orders, his case was more favourable;
 "wherefore the court could not sustain these orders as a defence, nor regularly ad-
 "mit a proof of them."

"But, in the next place, every circumstance insisted upon by the defendant, in re-
 "lation to these orders, are fairly admitted by his Majesty's Advocate in his informa-
 "tion; and this admission is accepted of in the information for the pannel: so that
 "had this circumstance been material, he had all the advantage he could hope from
 "a proof; though in truth it was altogether immaterial."

"As to all that happened in the Grass-market, he had a proof allowed him."

"It has indeed been objected; That here he was limited to evidence with respect to
 "his behaviour. But as *behaviour* is a relative word, it necessarily let him into a
 "a proof of the behaviour of every person there present: and this is apparent from

In the case of Maclauchlan, tried in 1737, the court allowed him "to adduce *what evidence he could*," &c. In the additional information for Maclauchlan, it is said, "That happily, by our practice "now, pannels are allowed to prove at large all facts and circumstances that can exculpate them, or alleviate their guilt."

March 3. 1740, In the mutual prosecutions between the Earl of Morton and Sir James Stewart of Burray, for a riot, which were conjoined, the court allowed the pannels "to prove the *several facts* "and *circumstances* alledged for them in their defence." And in the case of Davies for murder, 14th March 1740, the court found the libel relevant; "but allowed the pannel to prove *all facts and circumstances* alledged by him in his defence; and repelled all objections to the libel."

In the case of Samuel, tried 12th July 1742, at the instance of a private prosecutor, as well as of the Advocate, for violating the sepulchres of the dead, and raising and stealing a dead body, the court found, "That John Samuel, pannel, his being guilty of the crime "libelled, or art and part thereof, relevant to infer an arbitrary punishment, damages, and expences; and allow the pannel to prove

"the proof taken; and it is the word the pannel's lawyers chose in setting forth his defence, as is apparent from the 19th page of their information in the first paragraph.

"As to circumstances subsequent, one only was insisted on; namely, That his gun appeared not to have been fired. It was in self immaterial. For, *1mo*, it did not exculpate from giving orders to fire; *2do*, he might have fired the gun of one of the soldiers under his command; *3tio*, to make it an ingredient of any force, he behoved to offer a proof, that the gun inspected after the affair was over, was, during the whole time of the execution, and until it was inspected, in his hands; which was not offered to be proven.

"But, in the *last* place, even this circumstance was allowed to be laid before the jury; for upon the request of the pannel's counsel, the magistrates present did, in open court, declare the gun produced to them by Captain Porteous, when, after the misfortune, they were proceeding to take a precognition, appeared to be clean."

This is taken from an unprinted paper preserved in the collection of a gentleman who was at the time of this trial in the King's service.

"all

“all facts and circumstances which may tend to alleviate and exculpate;
“and repelled the haill objections,” &c.

In the case of two gentlemen of the name of Gordon, tried 27th February 1744, for a riot, the court found “the libel relevant to infer an arbitrary punishment, damages, and expences; but allowed the pannels to prove all facts and circumstances for alleviating or exculpating, and remitted the pannels and libel, as found relevant, to the knowledge of an affize.” This has been the style almost ever since *.

§ 4. Of jurors.

Anciently the jury consisted, sometimes of nineteen †, sometimes of eleven, ‡, and very often of thirteen ||.

They were brought *ex vicineto*, i. e. from the neighbourhood of the place where the pannels dwelt, however distant **. In one case, in

* In the case of James Stewart, tried for the murder of Campbell of Glenure at Inverary in 1752, the word *alleviate* is left out, and he only allowed to prove all facts and circumstances tending to *exculpate*. But this is not the only singularity in that case. It was very singular for the Justice-General to sit, and for the Advocate to plead, at a circuit.

† In the year 1557, MS. Abst. i. 37.

‡ Ibid. p. 41. in 1557.

|| Ibid. p. 38. 40. 52. in 1557, and much later.

** Several persons dwelling in Ross, who were summoned as affizers on Leslie of Arthursfeire, protested, That in regard the said process is delayed, and that they have been put to great charge and loss in being called from home in time of harvest, and expences of travelling, that therefore they may not be obliged to attend again on the said affize; 23d Aug. 1559, MS. Abst. i. 73. And there are instances of this much later. In the case of the Faas, tried at Edinburgh in 1674, for forning, murder, &c. ten of the jury were brought from that part of the country in which the crimes had been committed. But it was easy to foresee, what experience has since proved, that if a fair trial be aimed at, a pannel ought to be tried at a distance from his ordinary place of residence, or by jurors that live at a distance from him. If he be tried by his neighbours, he, in all probability, will be tried either by his friends or his enemies,

in which a sufficient number of them did not appear, a precept from the King was produced, ordaining the justices to cite others, either such as were in court, or in the town of Edinburgh; which was done, May 26. 1586. MS. Abst. i. 140.

Surgeons * were put upon juries, and butchers †.

There are several instances of challenges to jurors upon cause shown, MS. Abst. i. 58. 174. 249.; but there is no instance of a peremptory challenge, or without cause ‡.

Persons.

at least by persons prejudiced either for or against him; which strangers cannot well be. Accordingly it is universally acknowledged, that the fairest trials are at Edinburgh. Murdison and Miller, (See No 89.), requested the Advocate to try them at Edinburgh, and not at Jedburgh, as his Lordship at first intended; and he very properly indulged them. Had they been tried at Jedburgh, they would not have had so good a chance for a fair trial; because the jury must have been influenced by character, private knowledge, and a desire to make an example. Had James Stewart, who was convicted of murder at Inverary, been tried at Edinburgh, he, in all human probability, would have been acquitted, unless, which is not to be supposed, uncommon pains had been taken to pack a jury; that, however, I am sorry to say, it is by no means impossible to do in this country. From what has been said, it follows, that at circuits, judges should never take the petit jury from the pannel's own county.

* Nov. 1597, MS. Abst. i. 176.

† 1562, 1564, 1589, *ibid.* p. 52. 58. 150.

‡ Lord Royston touches upon this point in his MS. notes upon Mackenzie's Criminals, p. 250. As the passage is curious and important, it shall be transcribed as it stands. "Exceptions, besides what is said by Hope, are noticed in the following observation. By an unprinted act, parl. 1607, those who are to be tried at the justice-airs "on the borders, might challenge five of the assize without showing cause. The "title of the act is, *Anent the union of the two kingdoms*, or rather Hope excerpts it "from that act, and it only relates to border-commissions. Though by the law of "England, the pannel may except against a certain number of his assize without "showing cause, yet it does not seem, by any thing I can find, that any such thing "obtains with us, except what is said by Hope in his Major Practics, p. 353. What "Hope says is, That a pannel may reject five of the assize upon suspicion of their partiality, but no more, unless he propone a sufficient exception to set and decline "them; and cites No 1607, p. 171. But what is meant by these numbers, I cannot "tell.

Persons not twenty-five years of age *, or not worth the King's unlaw, i. e. L. 10 Scots †, could not be jurors.

It is all along marked how each juror voted. Those who voted for the pannel have the letter *c.* (for *clenfit*), or *acquitted*, at their names; those who voted against him have the letter *f.* (for *fylit*), or in later times, *g.* for *guilty* ‡. The act 1672 ordered the chancellor of the jury to mark how each juror voted. This was necessary as long as the jury was liable to be tried for error.

Trial by oath of purgation and compurgators, was in use before the ecclesiastical courts as late as 1547.

The learned author of the Historical Law-tracts, i. 115. says, That in place of trial by single combat, the oath of purgation was substituted. The form of which was this: "The defendant brings along with him into court certain persons, called *compurgators*; and after swearing to his own innocence, and that he brings the compurgators along with him to make and swear a leal and true oath, they all of them swear, This oath is true, and not false." And he refers to *Quon. attach.* c. 5. § 7. The following case illustrates this, and shews the practice continued longer than is commonly supposed. Jan. 12. 1563, Sir Richard Smart chaplain was indicted for the slaughter of Archibald Durhame in 1547. Pleaded for him, He cannot be obliged to underly the law before the justiciary, having already underlain the spiritual law for this crime, and been purged and made innocent thereof by Mr John Spittal, official

"tell. As to the quotation from Hope's Practices, noticed above, it seems only to refer to the border-commission, the title of the unprinted act there quoted, being, *Anent the union of the two kingdoms*, by which the border-commission was established, and so as not to be extended to the proceedings of other courts."—Our practice, however, ought to admit of such challenges. See below, under Mungo Campbell's case, N^o 84.

* MS. Abst. i. 297. 7th June 1616.

† Ibid. p. 302. 22d July 1617.

‡ MS. Abst. i. 50. 85. 168. &c.

of St Andrew's, a judge competent for the time; and a testimonial was produced under the seal of office of the said official.—Answered for the pursuers, They did not know of this testimonial; and they protest, that they may reduce it, for such reasons as they shall give in a bill to the Lords of her Majesty's council, and that process should go on notwithstanding. The justice, by consent of parties, continues the diet till the next justice-air, to be held at Forfar. This very curious paper is recorded in the books of Adjournal; it bears date at Perth, 17th November 1547, and is as follows: “ Quo
 “ die citatis omnibus et singulis interesse habentibus, seu habere
 “ pretenditibus, ad accusandum, si voluerint, Dominum Richar-
 “ dum Smart capellanum, de homicidio quondam Archbaldi Dur-
 “ ham, apud ecclesiam parochialem de Innerkeilor, anno instanti,
 “ ut asseritur, interfecti; alioquin ad videndum et audiendum ipsum
 “ Dominum Richardum, de hujusmodi homicidio, de cujus arte et
 “ parte ut dicitur infamatur, canonice, et juxta juris exigentia, le-
 “ gitime purgari, et purgationem suam desuper accipi et admitti;
 “ et purgatione facta, ad videndum et audiendum decretum et auc-
 “ toritatem judicis ordinarii subscript. in hac parte interponi, et
 “ literas testimoniales seu liberatorias dari, desuper decerni et fulmi-
 “ nari, aut ad allegandam causam aliquam rationabilem quare pre-
 “ missa fieri non deberent: præterea ad instantiam dicti Domini Ri-
 “ chardi, super præmissis, ac aliis forsan sibi objicien. comparuit
 “ dictus Dominus Richardus, et ad purgationem suam circa præ-
 “ missa per dictum Dominum judicem petit et postulavit; quam
 “ quidem Dominus judex in poenam contumaciæ partium interesse
 “ habent. citatorum, et non comparentium, eundem Dominum Ri-
 “ chardum ad suam purgationem admisit, et per præsentem admit-
 “ tit. Dehinc Dominus Richardus sit admissus ad sacra Dei Evan-
 “ gelia, juravit se immunem et innocentem de homicidio, ac ullius arte
 “ et parte fuisse et esse; ac ulterius ad purgandam suam innocentiam
 “ produxit Davidem Petri, Walterum Petri, Joannem Gibson, Ja-
 “ cobum Ramsay, Thomam Garden, Henricum Perth, Alexan-
 “ drum Ogylvie, Johannem Thorntoun, Davidem Fithie, suos vi-
 “ cinos

"cinos propinquiores præsentes, ut affirmarunt tempore perpetrationis dicti homicidii; qui similiter jurati compurgarunt eundem Dominum Richardum de hujusmodi homicidio, et arte et parte ejusdem, in uberiori forma. Præterea idem judex decrevit eundem Dominum Richardum de hujusmodi crimine homicidii legitime et canonice purgatum, adeoque eum innocentem absolvebat de dicto crimine, prout per præsentes absolvit literasque suas testimoniales desuper decrevit;" MS. Abst. i. 54. 55.

Clergymen, and others, accused of immoralities, are still admitted to their oath of purgation before the Ecclesiastical courts, when the proof is dark and doubtful. The author just now quoted is of opinion, that trial by jury came in place of trial by compurgators. In support of this position, he might have referred to the style of the oath, which is still administered to jurors: "You swear you shall truth tell, and no truth conceal, so far as you pass upon this assize." If it be supposed that jurors were originally witnesses, the oath is perfectly proper.

§ 5. Of Verdicts.

THE jury anciently was in the use of adjourning*. Verdicts often found pannels guilty art and part of crimes in which they were principals †, and there were no accessories.

* In the case of John Lock, and others, tried for mutilation 11th May 1548, an assize was sworn. "Whilk persons, for divers causis and considerations moving them, continuit the pronounciation of their deliverance upon the dntay and letters persequit against the forenamit persons, unto the 7th day of November next;" MS. Abst. i. 13. And there are several later instances.

† 11th May 1570, in a case of adultery; 1st September 1570, in a case of sodomy, and in many others; MS. Abst. i. 75. 87. 103. 373. The abridger observes on these cases, "That they serve to show a pannel may be convicted of art and part where there is but one single fact libelled; so that art and part does not properly signify *ope et consilio*, which is but an accession to another's guilt, but even comprehends the principal actor, and was no doubt introduced in cases where the direct fact could

not

The first verdict subscribed by the chancellor was in April 1578 *. It bears, "In witness whereof, their chancellor has subscriv'd thir presents with his hand." The style before was, "The assize, &c. be the judicial declaration of their chancellor," &c. This style again took place, and was generally used for a long time after.

§ 6. *Of the court.*

There is one instance of the King (Ja. VI.) sitting in the justice-court †.

Lords of Session were often appointed assessors to the Justice ‡; and 22d June 1625, and 2d August 1633, the Justice-Clerk was made one of these assessors; which shows, that he was not originally, *virtute officii*, a criminal judge. But he was declared to be one of the judges of the justice-court by an act of the privy council in 1663.

It was understood anciently, that the court might in all cases consider what degree of punishment should be inflicted after the verdict was returned ||.

The

not be proved, but only was to be inferred from circumstances and presumptions," p. 373. The case of sodomy, just now mentioned, is the only one of the kind I have met with in the books.

* MS. Abst. i. 105.

† In June 1591, while his Majesty was present, twelve of the jury, who had acquitted one Barbara Napier, indicted for witchcraft in May preceding, were tried for wilful error and perjury. Being asked, Whether they would stand trial, or *come in will*? they declared, they would come in his Highness's will. Whereupon his Majesty in judgement, and in presence of the Lords of Secret Council, "declairit his will to be, that in respect he understood that it was not through artful error they acquit the said Barbara, therefore that the said persons be assoylt frae the penalties in bodie, guides, and gear." MS. Abst. i. 159.

‡ In Lord Balmerino's trial for a libel, 3d December 1634, Lord Errol sat as Justice-General, by a special commission for this trial. His assessors were, the Lord President, Lord Register, and Lord Balcomie. MS. Abst. i. 360.

|| In the case of Bryce for murder, 22d March 1639, in answering the defence, the

The justice-court could not sit when the parliament was sitting but by dispensation*.

Often when a trial was put off, the depositions of the witnesses were taken to lie *in retentis*, sometimes with the pannel's consent, sometimes without it†.

A statute which passed in the reign of Charles II. new-modelled the supreme criminal court into what it is at present. The preamble of that statute sets forth, "That whereas formerly assessors from time to time
" were appointed to the Justice-General in matters of importance,
" which, being ambulatory, cannot be so convenient as if all the
" members of that court were settled and chosen by his Majesty of
" fit persons, who might make it their work to make a just and
" constant procedure in matters criminal;" therefore it enacts,

the Advocate says, "All who assist are art and part. But whatever be in that as to
" liberation *a pœna ordinaria*, that question does not enter into the relevancy, or
" hinder the pannel to pass to the knowledge of an assize; but is only pertinent
" to the Justice-General after trial, to consider, whether the same merits *pœnam ordi-*
" *nariam* or *extraordinariam*."—Upon this the abridger observes, "This last is very
" remarkable, that my Lord Advocate asserts, That the judge, after returning the
" verdict, has power to determine the degree of punishment, even whether to make
" it capital or not; which I always looked on as a fault in our forms of procedure,
" to be obliged to determine the relevancy before leading the proof; and I wish our
" judges would follow this great man's opinion in this."—In the case of Bickartoun,
15th November 1581, "The justices remitted the dittay to the knowledge of an as-
" size; reserving the consideration of the import of the defences to the pronouncing
" of the doom, conform to the laws of the realm." Upon this the abridger ob-
serves, "This is another instance that the relevancy as to the degree of the punish-
" ment was reserved until the return of the verdict."—These two observations show
this abridgment was made by Lord Roystoun; for the same opinion is given by him,
and the same cases referred to, in his *Notes on Mackenzie's Crim.* p. 247. In the case
of Lindsay and Brack, tried for murder in July 1717, the court superseded judging
the defence on an act of indemnity, till the proof was concluded, and the verdict re-
turned. 2d August 1721, same judgement.

* MS. Abft. i. 2.

† MS. Abft. i. 367. 379. 386.

“ That the office of deutes in the justice-court be suppressed, and
 “ that five of the Lords of Session be joined to the Justice-General
 “ and Justice-Clerk, and all of them invested with the same and e-
 “ qual power and jurisdiction in all criminal causes: That the Ju-
 “ stice-General being present, preside, and in his absence the Ju-
 “ stice-Clerk; and in absence of both, that those present elect one of
 “ their number to preside; four of the whole number being always
 “ the quorum of that court, except at the circuit-court: That the
 “ persons to pass upon assizes be cited, and their names and desig-
 “ nations insert in an roll, to be signed by the said judges, or their
 “ quorum: That in all criminal pursuits, the defender, or his Ad-
 “ vocate, be always the last speaker, except in cases of treason, and
 “ rebellion against the King,” &c.

The decisions of the criminal court, since it underwent that re-
 formation, deserve much more respect than those which preceded it.
 Hence some late searches on very important occasions have been car-
 ried no farther back. See p. 586.

The record, however, preceding this period, affords many cases
 that are curious, and some that are instructive.

§ 7. *Of the King's Advocate.*

THis office has been divided. There were two joint King's Ad-
 vocates in 1570, and two in 1578*.

This officer has the title of Lord Advocate given him for the first
 time in the record 3d November 1598 †.

Anciently, when there was no private prosecutor, the person who
 informed the King's Advocate is often marked ‡.

* MS. Abft. i. 89. 107.

† Ibid. 182.

‡ Ibid. 314.

This office in 1528 was granted to two gentlemen, and for life *.

§ 8. *Of prolocutors.*

Prolocutors, or forespeakers, as they are sometimes called, were commonly persons of rank †, who appeared to countenance their friends, whether prosecutors or pannels, and were attended by an advocate or two to assist them in matters of law.

Lords of Session sometimes acted as prolocutors ‡.

Anciently pannels who were unable to fee lawyers applied, to the council, or court of session, for an order upon some gentlemen at the bar to assist them; which was always granted ||.

* I have seen their commission, which is as follows. “*Jacobus Dei gratia Rex Scotorum, omnibus probis hominibus suis ad quas presentes literæ pervenerint, salutem. Sciatis, quia fecimus, constituimus, et ordinavimus, ac, tenore presentium, facimus, constituimus, et ordinamus predilectos familiares clericos nostros Magistros Adam Otterburne de Auldham, et Jacobum Foulis burghensem burgi nostri de Edinburgh, et eorum alterum diutius viventem, conjunctim et divisim, nostros advocatos, pro omnibus diebus vitæ eorum, cum potestate, et eorum alteri diutius viventi, conjunctim et divisim, dictum officium exercendi, simili modo et adeo libere in omnibus, sicut ulli alii idem retroactis exercuere temporibus, pro cujusquidem officii usu et exercitatione,*” &c. This grant is dated at Edinburgh, 5th December 1528.

† MS. Abst. i. 42. 43. 109.

‡ Ibid. p. 89.

|| 14th July 1634, it was alledged for Andrew Lindsay, indicted for murder, That he had no lawyers to plead his cause. *Ans. By Advocatus,* That upon his application either to the Lords of Secret Council or Session, their Lordships would have ordered lawyers to assist the pannel; and, *upon their refusing, have granted letters of horning against them:* That therefore the pannel having neglected the ordinary remedies, there was no reason why the process should not go on. The assyze fylit the pannel. *Ibid. 361. in fine.*

§ 9. *Of the torture.*

ON the 24th June 1596, John Stewart, Master of Orkney, was indicted for consulting with Alifon Balfour, a witch, for the destruction of Patrick Earl of Orkney, his brother, by poison.—The confession of Alifon Balfour was libelled upon. He gave in a written declaration, by way of defence, bearing, *inter alia*, as to the confession, “No regard can be had to it, in respect the said confession was extorted by force of torment; she having been kept forty-eight hours in the Caspie laws; her old husband, a man about ninety years of age, put in heavy irons; her son put in the buits, where he suffered fifty-seven strokes; and her little daughter, about seven years old, put in the pilniewinks; all in the poor woman’s presence, to make her confess.” MS. Abft. i. 166.

It was pleaded for Alaster Grant, who was indicted for theft and robbery 3d August 1632, “That he cannot pass to the knowledge of an affize, in respect he was twice put to the torture, first in the boots, and next in the pilliewinks or pinniewinks; in both which he constantly denied his guilt or accession to the crimes libelled, and so ought to be free from any further prosecution; as is clear by Clarus,” &c. He was convicted, and condemned to death. MS. Abft. i. 346.

Lord Roystoun observes *, “The instruments in use amongst us in later times were, the boots, and a screw for squeezing the thumbs, thence called *thummikins*. The boot was put upon the leg, and wedges driven in; by which the leg was squeezed sometimes so severely, that the patient was not able to walk for a long time after: and even the *thummikins* did not only squeeze the thumbs, but frequently the whole arm was swelled by them. Sometimes they kept them from sleep for many days, as was done to one Spence, anno 1685. And frequently poor women, accused

* Notes on Mack. Crim. *ad* p. 273.

“ of witchcraft, were so used.—Anciently I find other torturing instruments were used, as pinniewinks or pilliwinks, and caspitaws or caspicaws, in the Master of Orkney’s case, 24th June 1596; and tofots, August 1632. But what these instruments were, I know not, unless they are other names for the boots and thummikins.”

The boots and thummikins were (it is said) imported into this country from Russia by a Scotchman, who had been long an officer in the service of that power.

No inferior judge could torture. It was employed by the, privy council and justiciary only. By the last, never during trial before the jury, but by way of precognition. What the person who underwent it confessed, was proved at his trial.

The claim of right in 1689 declares, “ That the using torture *without evidence, or in ordinary crimes*, is contrary to law.”

It was abolished altogether by the act for improving the union of the two kingdoms, 7^o Ann. c. 20.

§ 10. *Of sentences.*

Anciently the sentence very seldom fixed the day of execution; but generally the punishment was inflicted the next day, or soon after *.

When parties confessed, or *came in will*, sentence was pronounced, whether capital or arbitrary, without a jury †.

The

* MS. Abft. i. 312.

† 15th June 1627, Sir John Stewart of Methven having been indicted for three notour adulteries, came in will.—His Majesty’s will was, that the judges should proceed against him according to law; but that after sentence he should be imprisoned in the castle of Edinburgh for life, or until his Majesty’s further pleasure should be known. Accordingly, without putting him to an assize, the court, upon his former coming in will, sentenced him to be hanged, but respited execution till his Majesty’s pleasure was known; and in the mean time confined him in the castle.

MS.

The court often applied to the parliament for directions as to the sentence *, and often to the privy council.

Procedure and sentence was often stopped †; and even after sentence

MS. Abft. i. 316. 317.—The King's will was often very singular. Edward Johnston, indicted for treason January 20. 1597, having come in will, he was pardoned as to the pain of death, on condition, that he discharged a debt of 8000 merks due to him by Thomas Sinclair, goldsmith, burges of Edinburgh, and paid 3500 merks to Sir George Home of Spot, donatar to his escheat. MS. Abft. i. 176.—Sometimes the King's will was outrageously severe. 20th August 1618, Mr Thomas Rofs was brought to trial for writing and affixing on the door of St Mary's, in the university of Oxford, a devilish, scandalous, and seditious writing, containing reflections on his own countrymen, asserting, that they should be all put from the court, except his Majesty and children, and a few others; and upbraiding the English for suffering themselves to be abused by such a multitude of *offscourings of people*. The pannel acknowledged the fact, alledging he did it out of a fit of madness; for which he was sorrowful, and put himself in his Majesty's will. He was, by his Majesty's special warrant, condemned to have, first his hand, and then his head, struck off, and affixed on the Nether and West Port on a prick of iron. MS. Abft. i. 303.

* In the case of Frazer, convicted for murder 30th July 1641, the court delayed pronouncing sentence, that the Lords of Parliament, then sitting, might be advised with; and afterwards presented a supplication to the parliament, setting forth the matter, and specially the nature of the proof; taking notice, that there was no direct proof, or judicial confession, but only *indicia et præsumptiones*; therefore praying their Lordships advice and opinion. The parliament remitted back to the Justices to proceed against the person convicted according to the laws of the kingdom. MS. Abft. i. 389.

† There is a very curious instance of this in the most ancient record, *6to Marci* 1494.

“ Thomas Turnbule in Fawlishop, Miles ad signaturam Regis, pro arte et parte
 “ furtive surreptionis xvii^{xx} (340) ovium, le zowis et weddris, extra Skaddamnefs, a
 “ Patricio Murray, in commitiam cum Johanne Weir; item pro arte et parte furtive
 “ surreptionis lxxx. catallorum, xii. equorum et equarum, et bonorum utensilium.
 “ nove domus extra Cartenhauch in com —, cum dictis furibus; item pro arte et
 “ parte furtive surreptionis lx. ovium extra Lewynhop a Patricio Murray; item pro
 “ furtiva receptione Roberti Turnbule de Mudlaw suorum filiorum, Johannis Turn-
 “ bulde de Newhalby, Thome Newtown, et Alex. Gray defuncto, xxx (200) ovium
 “ et xi. unius bovis, unius vacce, xxvi. boum et vaccarum, trium equorum et equa-
 “ rum,

tence was pronounced, the punishment was often mitigated by warrant from the King or council *.

Sentence was pronounced in prison, when the person convicted was not able to come into court †.

Often after conviction, a punishment was inflicted, and the pannel obliged to find security to appear afterwards, in order to suffer what further punishment might be thought proper.

“ rum, a David Tait de Pryn ; item pro arte et parte furti et — VIII^{xx}. (160) et VI.
 “ ovium, le hoggis, a Georgio Tait de Pryn, et suis tenentibus extra Sithop ; item
 “ pro arte et parte furtive sumptionis XVII. caprarum a Johanne Cleghorn, et suorum
 “ bonorum utensilium ad valorem XL. s. et XL. ovium, le zowis, a Willelmo Cleg-
 “ horn extra Lechtanehop ; item pro arte et parte furtive surreptionis VII. le stirkis
 “ a Johanne Scot, extra Glenfap ; item pro arte et parte rapine XXIII. boum et vac-
 “ carum.

“ R E X.

“ Justice, It is our will, and for certain considerations moving us, we charge zou,
 “ yat ze charge not, nor compel, our lovit knyght Sir Thomas Turnbule, to fynd
 “ fourtie in our justice-air, for satisfaccioun of party, for any accioun that he may
 “ be accusit of, committit before our coronatioun : And yis precept be zou sene and
 “ understandin, delyvir ye samyn agane to ye berar. Given under our signet at
 “ Linlithgow, ye xxv day of Februar, and of our regne ye sevint zer.”—MS. in
 libr. There are numberless later instances.

* There are numberless instances of both ; and sometimes trials for treason were remitted to the parliament ; Abst. i. 394. July 30. 1614. In the case of John Ronald, indicted for demembering William Donaldson, the jury found the pannel was in company with the other persons mentioned in the libel, when Donaldson's hand was cut off, and that he had a sword in his hand ; but whether he was the person that did cut off the hand, they can neither fyle nor cleanse him. Upon which the justice delayed sentence until he advised with the privy-council ; and that court ordained him to satisfy the pursuer for the demembration. MS. Abst. i. 290.

† MS. Abst. i. 315. This was to have been done in 1766 ; but the prisoner escaped before the day to which the court had adjourned to the tolbooth of Edinburgh.

§ 11. *Of punishments.*

THE first instance of punishing murder by hanging, is 30th July 1630 *; till that time, the punishment was always beheading, whatever was the rank of the criminal. Theft, notour adultery, &c. were always punished with hanging. In one instance, (June 1604), murder was punished with the wheel †.

The first instance of hanging in chains is in March 1637, in the case of Macgregor for theft, robbery, and slaughter ‡.

During the usurpation, fines were often lessened, or altogether remitted, on the application of the parties ||.

* MS. Abft. i. 182. 330.

† In the case of William Weir for murder, "he was sentenced to be broken alive upon a row or wheel, and lie exposed thereon for twenty-four hours; and there-
" after the said row, with the body on it, to be placed betwixt Leith and Warrie-
" ston, until orders shall be given to bury the body." MS. Abft. i. 216.

‡ He was sentenced to be hanged in a chenzie on the gallowlee till his corpse rot.
MS. Abft. i. 369.

|| MS. Abft. i. 450.

ARGU-

ARGUMENTS and DECISIONS,

IN REMARKABLE CASES,

Before the High Court of JUSTICIARY, and
other SUPREME Courts, in SCOTLAND.

PART I.

CRIMINAL CASES.

N^o 1.

April 1670.

Sir John Nisbet, his MAJESTY'S ADVOCATE,

A G A I N S T

THOMAS WEIR, commonly designed *Major Weir*, and JEAN
WEIR, his sister.

Venus nefanda, Incest, Adultery, Fornication, and Sorcery.

THE indictment against the Major sets forth, " That al-
beit [although], by the laws of God, the *Roman law*,
" common law of nations, and law and practice of this
" kingdom, the crimes of Incest, Adultery, and Bestia-
" lity, are most atrocious and abominable crimes, and are and
" should be severely punishable, by the pains of death, and confis-
" cation of moveables; and especially the said crimes of incest and
" bestiality being so horrid, and against nature and humanity itself,
" are and ought to be exemplarily punishable, in such a way and
A " manner

“manner as is fuitable to fo high and heinous abominations : Nevertheless,” &c.

Then it charges him, *1st*, With attempting to defile his fister-german Jean, when ſhe was but ten years of age; and that thereafter, when ſhe was paſt ſixteen, he committed inceſt with her, in their father’s houſe in Edinburgh, and elſewhere, in the years 1621, 1622, 1623, 1624; and that he and his ſiſter being now aged perſons, they did nevertheless continue their filthy and inceſtuous practices till lately. *2^{dly}*, That in the year he committed inceſt, in his houſe in Edinburgh, with Margaret Burdon, daughter to Mein, his the Major’s deceaſed wife, and Burdon, her firſt huſband; at which time ſhe was married to an Engliſhman. *3^{dly}*, That he committed adultery with divers married women during his marriage with his ſaid wife, and when he was ſingle; and his whole life has been a continued courſe of villany and lewdneſs; and he has perſiſted in the ſame until he was of great age, (paſt 70), and of purpoſe did keep the ſaid Jean Weir, his ſiſter, in his houſe, as alſo Beſſie Wemyſs his ſervant, for twenty-two years, and did not put her away till lately; and during the ſaid ſpace lay with her, as if ſhe had been his wife. *4^{thly}*, That he proceeded to the height of brutiſh abomination, in committing beſtiality with a cow in 1650, 1651, 1652; and upon one or other of the days, or in one or other of the months of the ſaid years, he having ridden to the weſt country on a mare, did then commit beſtiality with her. *5^{thly}*, It is no ſmall aggravation, (if any can be), that being guilty of ſuch abominations, and altogether void of religion and the fear of God; yet he has the confidence, or rather impudence, to pretend to fear God in a ſingular and eminent way, beyond others, and preſumed and took upon him to pray in many companies; thereby endeavouring to conceal and palliate his villanies, and impoſe upon the world, and to mock God himſelf, as if his all-ſeeing eye could not ſee through the ſlender veil of hypocrify. At leaſt he is guilty of one or other of the aforeſaid crimes, &c.

The record next bears, “My Lord Advocate takes inſtruments,
“ That

April 1670.

The KING against WEIRS.

3

“ That the pannel [prisoner] refuses to answer to his dittay [accusation] at the bar positively; but says, he thinks himself guilty of the aforefaid crimes, and cannot deny them.”

The Justices found the dittay relevant, [i. e. sufficient to infer the conclusions].

The indictment against Jean Weir sets forth, “ That albeit by the law of God, the Roman law, and the law and practice of this kingdom, incest, forcery, witchcraft, and consulting with forcerers, witches, necromancers, or with devils and familiar spirits, or the seeking and taking help, or resource, or consultations, from any person using witchcraft or forcery, are crimes, practices, and abominations, of an high and heinous nature, and ought to be and are severely punishable, with the pains of death, and confiscation of moveables : Nevertheless,” &c.

Then it proceeds to charge her with committing incest with her brother, as above stated; and that she had been discovered by her sister Margaret, and had confessed the crime to her father and mother, who sent her out of the house; yet she obstinately continued in the wickedness, even when she and her brother were of great age.

That when she was teaching a school at Dalkeith, in the year a woman came to her house there, and desired the said Jean to employ her to speak to the Queen of Feirie, and to strive and battle in her behoof with the said Queen, *meaning undoubtedly the devil*; and next day a woman gave her the root of some herb or tree, and told her, so long as she kept that, she would be able to do whatever she pleased; and also the said woman desired her to put her hand on the crown of her head, and repeat certain words; which she did: And “ albeit it was evident, that by the foresaid act and circumstances, that the said women were devils,” and evil spirits, at the least forcerers; yet she did willingly converse and consult with them, and take the said root or tree from them; and has confessed, that she did keep it some time, and did find the help she had got from the devil was effectual, in so far as immediately

after the said woman or spirit went away, she addressed herself to spinning; and having spun but a short time, found her pirn full of more yarn than possibly in so short time, by good means, could have been, &c.

She confessed judicially the dittay; on which the Advocate took instruments.

The Justices found the dittay relevant as to the incest; and the Advocate declared he insisted upon the other article of forcery as an aggravation.

Several witnesses were examined against the Major. As to his sister, her own declaration was the only evidence produced.

The jury unanimously found the Major "guilty of the horrid crimes of bestiality with the mare and cow libelled, and of the crime of incest with Jean Weir, his sister-german, in manner specified in the dittay; as also by a plurality of voices find him guilty of adultery and fornication; as also unanimously, and in one voice, find the other pannel, Jean Weir, to be guilty of incest with the said Thomas Weir, her brother-german, in manner specified in the dittay."

The Justices adjudged the Major to be strangled at a stake, and then his body to be burnt to ashes, on Monday next, [11th April 1670], and Jean Weir to be hanged, and all their goods escheated.

N. B. No counsel are marked for the pannels in the record.

N^o 2.

September 10. 1678.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JAMES LEARMONTH.

Accession to murder.—Jury several times reinclosed, and ordered to amend their verdict.

THIS was a political trial; in which the procedure and judgment were most improper, according to Fountainhall, p. 13. 14. In p. 26. he takes notice of a case of child-murder, in which the jury was reinclosed to amend their verdict.

Att. Sir G. Mackenzie.

Alt. Sir G. Lockhart, David Thoirs.

N^o 3.

September 13. 1678.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

TEN WOMEN.

Witchcraft.

THEY were found guilty “of the crime of witchcraft, in respect they now all confessed paction with the devil, and renouncing their baptism;” and condemned to be burnt.

Mr Gideon Penman, a minister, who had been deprived for immoralities, was accused by some of the witches of being present at their meetings with the devil, who called him his chaplain. He was obliged to find security to stand trial.—Fountainhall says, they were ready to have accused many gentlewomen, and others of fashion, had they been permitted.

N^o 4.

N^o 4.

December 13. 1681.

His MAJESTY'S ADVOCATE,

A G A I N S T

The Earl of ARGYLE.

Treason.

THE libel [charge] was found relevant to infer treason, upon act 30. parl. 8. James VI.; and relevant to infer death, upon act 10. parl. 10. James VI.

Eleven peers and four lairds [landed gentlemen] who composed the jury, brought in unanimously a verdict, Dec. 13. 1681, against him.

Doom of treason and forfeiture was pronounced against him Dec. 23. 1681, after he had made his escape.

See too Fountainhall, p. 166.

Att. Sir G. Mackenzie. *Alt.* Sir G. Lockhart, Sir J. Dalrymple, W. Pringle, &c.

N^o 5.

December 21. 1685.

His MAJESTY'S ADVOCATE,

A G A I N S T

The deceased James Scot Duke of BUCCLEUGH, Anna Duchess of Buccleugh, and her children, Sir James Dalrymple of Stair, and Andrew Fletcher of Salton.

Treason.

THE charge was laid on act 69. parl. 1540, "anent [concerning] forfeiting heirs for the treason of their predecessors," and act 1669, allowing forfeitures in absence. The Duke and Mr Fletcher were accused for the invasion of England;—Sir James for entertaining intercommuned rebels in 1679, 1680, 1681, 1683, before he fled abroad.—See Fountainhall, p. 386. 388.

N^o 6.

N^o 6.

August 29. 1687.

His MAJESTY'S ADVOCATE,

A G A I N S T

Dr GILBERT BURNET.

THE record bears, that this day the Doctor was often called to compear to underly the law, [stand trial], for the crimes of treason, in so far as he being a Scotchman by birth and education, had been cited at the market-crofs of Edinburgh, pier and shore of Leith : That he did write, (Hague, 1st May 1687), and subscribe a letter, to the Earl of Middleton, one of the principal Secretaries of State for England, acquainting him, That he was informed of the process of treason ; and for answer writes, That he had been thirteen years out of the kingdom of Scotland, and is now upon the point of marrying in the Netherlands ; and that he is naturalised by the states of Holland ; and that thereby (during his stay there) his allegiance is translated from his Majesty, to the sovereignty of the provinces of Holland ; and in the end of his letter certifies, that if his declinature be not taken off his hand to sist the process, “ he “ will *appear in print*, in his own defence, and will not so far betray his own innocence as to suffer a thing of that nature to pass upon him ; in which he will make a recital of affairs that has passed these twenty years, and a vast number of particulars which he believes will be displeasing to his Majesty ; and therefore declares he may not be forced to it :” which is a direct declining of his Majesty’s authority ; denying his allegiance to his Majesty ; and asserting his allegiance is translated from his Majesty to the sovereign of the states of Holland ; and a threatening of his Majesty, to expose, traduce, and disparage, and belie his Majesty’s government, and the public, almost for twenty years past, though he acknowledges it will be displeasing to his Majesty : yet, by a most indiscreet and disloyal

loyal insolence, he threatens to do it in contempt, except, forfooth, his Majesty shall acquiesce, and suffer the decline of his royal authority, to pass from the process, as having no allegiance due to him from the Doctor, in manner at length mentioned in the criminal letters raised, &c.

The court adjudged him to be denounced our Sovereign Lord's rebel, and put to the horn, and escheated all his goods.

N^o 7. June 4. 1694.

JOHN LITTLE of Riggs, writer in Edinburgh, with concurrence [concurrence] of his Majesty's Advocate,

AGAINST
ALEXANDER and WILLIAM HENRYSON.

Case remitted to the Justices of the Peace.

IN this case the libel charged hamesucken *, riot, battery, and defamation; but the first having been past from, the court remitted to the Justices of Fifeshire, "with power to them to proceed therein, to the final decision thereof, and to determine upon the expences of the witnesses adduced before this court, and upon the whole other expence of this criminal process, by which of the parties the same shall be paid."

Adv. Advocatus, Frank.

Alt. Sir Pat. Hume, Wal. Pringle.

* From *haim*, [home], and *soeken*, [to seek or pursue]. The nature of the crime is explained below, in Macgregor's case, 1752.

N^o 8.

Dec. 1694.

FLETCHER, &c. against GILLESPIE, &c.

9

N^o 8.

December 24. 1694.

HENRY FLETCHER, cousin-german to the deceased Major Menzies, Lieutenant-Colonel HOME of Craden, and his Majesty's Advocate,

A G A I N S T

JOHN GILLESPIE, JOHN ANDERSON, and ROBERT STEVENSON.

Officer who has a warrant to apprehend a person accused of murder, may kill him with impunity if he resist.

THE pannels were indicted for the murder of Major Menzies. The defence was, That he had, the day before that libelled, killed Mr Park, town-clerk of Glasgow; and when they endeavoured to apprehend him, in consequence of a legal warrant, he resisted them with his drawn sword; and therefore it was justifiable to kill him, act 22. parl. 1. sess. 1. Ch. II. "concerning the several degrees of casual homicide."

In this case the interlocutor on the relevancy is as follows. "Sustain the libel relevant to infer the pains of death libelled; but also sustain the defence proponed for the pannels, viz. That they, either by order of Mr Francis Montgomery, a privy counsellor, or of the magistrates of Glasgow, proceeding upon the notoriety of the murder the day libelled, committed upon the person of Mr Park the town-clerk, and the flight of the Major, relevant to elide the libel *simpliciter*, unless the pursuer prove, that the Major offered to surrender himself prisoner before the said Major was attacked by the pannels, which they sustain relevant to elide the foresaid defence, *quoad* such of the pannels only as did actually kill, or gave command to shoot, after his offer to surrender, as said is; but not against any other of the pannels as art and part, in respect they were assisting, *in actu licito*: and repels all the other defences," &c.

B

The

The jury found the libel not proved, and the defence proved; and that it was not proved the Major offered to surrender himself before he was attacked.

Upon this the pannels were dismissed from the bar.

Act. Sir Ja. Ogilvie Solicitor, Menzies, Ro. Forbes. *Alt.* Sir Pat. Hume, Wal. Pringle.

N. B. There are long informations, and additions to them, by way of minutes, in the record.

N^o 9.

August 5, 1695.

Andrew Lord ROLLO, and his Majesty's Advocate,

A G A I N S T

JAMES EDMONSTON of Newton.

Accession to murder punished with banishment for life.

HE was indicted for being accessary to the murder of the Master of Rollo, who was killed by Patrick Graham of Inchbraco.

The libel was sustained by the court, relevant to infer an arbitrary punishment.

The jury, all in one voice, found it proved, 1st, That Graham of Inchbraco had no sword about him when he came from Invermay's house. 2^{dly}, That the sword with which he killed the deceased, was the pannel's. 3^{dly}, That after he was killed, the pannel said he thought it fairly done, and the pannel and Inchbraco whispered together.

The court banished him for life, and ordered him to leave the kingdom betwixt and the 1st November then next, and to remain till he found security not to return under the penalty of 1000 merks.

Act. Sir Ja. Stewart, *et alii*.

Alt. Sir Pat. Hume, Cuningham, Wal. Pringle.

N^o 10.

N^o 10.

November 6. 1695.

His MAJESTY'S ADVOCATE,

A G A I N S T

GEORGE CUMING.

Murder.—Special verdict.—Capital sentence.

HE was indicted for the murder of Patrick Falconer, a soldier; and the jury found it proved, That some words falling out between George Cuming, the pannel, and three soldiers, in the West Port, in the month of September last, the soldiers drew their bayonets, and advanced to the pannel; who, when they were within the length of his sword, drew the same; and defending himself, Patrick Falconer, one of the three soldiers, was killed; whereby they found him guilty of *manslaughter*.

The court sentenced him to be hanged, and escheated his moveables.

A hard judgement, though he was *auctor rixæ*. See *Inform. for Finhaven, in his trial, p. 82.*

Att. Sir Ja. Stewart, Sir Ja. Ogilvy.

Alt. Sir Pat. Hume, Dav. Forbes.

B 2

N^o 11.

N^o 11.

December 23. 1696.

Sir James Stewart, his MAJESTY'S ADVOCATE,

A G A I N S T

THOMAS AIKEN.

Blasphemy capitally punished.

HE was indicted for blasphemy by order of the Privy Council, and so the indictment bears, upon the law of God, the law of this and all other well-governed realms, and specially 21st act, 1st parl. Ch. II.; and 11th act, 5th sess. of the then present parliament.

It was charged, *inter alia*, That he had called the Old Testament Ezra's fables, profanely alluding to Esop's fables: That he had called Christ an impostor, who had learned magic in Egypt, from whence coming into Judea, he had picked up a few fisher-fellows, who he knew by his skill in physiognomy had strong imaginations, and through their help played his pranks, as he blasphemously termed our Saviour's miracles: That Moses was a better artist and politician than Jesus; and that the scriptures were stuffed with madness, nonsense, and contradictions, so that he admired the stupidity of the world in being so long deluded by them: That he rejected the mystery of the Trinity and incarnation; maintained, that God, the world, and nature, are but one thing; had said, he preferred Mahomet to Jesus; and hoped he would see Christianity extirpated; and was confident it would be so in a short time: That when he found himself cold, he had wished to be in the place Ezra called Hell to warm himself, &c.

The court found "Curfing or railing upon any of the persons of
 "the Blessed Trinity, relevant to infer the pains of death;
 "and

Feb. 1697.

DAVIDSON against DOUGLAS.

13

“ and the other crimes likewise relevant to infer an arbitrary
“ punishment.”

The jury, *December 24. 1696.* “ unanimously find it proven,
“ That the pannel has railed against the first person, and also
“ cursed and railed our blessed Lord, the second person, of the Holy
“ Trinity ; and further find the other crimes libelled proven.”

The court adjudged him to be hanged, and his body to be interred
at the foot of the gallows, and escheated his moveables.—
He was executed accordingly.

N. B. The record does not take notice of any informations or pleadings, or the
appearance of any counsel for him.

N^o 12.

February 1697.

CHRISTIAN DAVIDSON, and his Majesty's Advocate,

A G A I N S T

Captain CHARLES DOUGLAS, Ensign Francis Scot, and Alexander
Stewart.

Rape.—Special verdict.—Arbitrary punishment.

THE indictment charged, That the Captain, with the assist-
ance of the other two, did, upon the 13th October 1696,
commit a most vile and atrocious rapt [rape] upon the person of
Christian Davidson, a poor innocent maid, going about her lawful
affairs, in the Green of Glasgow, and that under the cloud of night,
and with several other villanous and aggravating circumstances,
such as laying violent hold on her, and dragging her away by force,
tirling off her cloaths, and beating her person, notwithstanding
her crying and resisting to her power, hindering all other persons
from coming to assist her ; and last of all by mocking at her dis-
tress and calamity, and boasting and glorying in the wicked-
ness.

The

The diet was continued, and the lawyers ordered to interchange their debates.

It was objected, in defence, 1. That no abduction was libelled, so that the charge was only *stuprum violentum*, which is not sufficient to infer death.

Answer. Not necessary to libel abduction, in order to subject to the pains of death.

2. The woman did not complain for a considerable time after the crime is said to have been committed, whereas the law requires she should in twenty-four hours.

Ans. This not necessary by our later practice.

3. The pannels will prove *alibi*, by shewing in what company they were from the morning of the day libelled till night.

Ans. This not relevant as offered. *Alibi* is an exception that comes the nearest of any to denying the libel *; and therefore lawyers require, 1st, That it should be so qualified as to show it was impossible for the person who pleads it to commit the crime, as when he is alledged to have been in another kingdom, or at a great distance, but here it is not denied he was in the same town. 2^d, When *alibi* is relevantly qualified, it must be proved by unexceptionable witnesses; but here fellow-soldiers only named, who are not, in such a case, *omni exceptione majores*.

The court found "the pannel's violently ravishing Christian Davidson, or being art and part thereof, relevant to infer the pains libelled; and finds the aggravations libelled, relevant to infer an arbitrary punishment; and repels the defence of *alibi* as proponed, and the hail other defences," &c.

The verdict was as follows: "February 23. 1697. Find the pannels, Captain Charles Douglas, Ensign Francis Scot, and Alexander Stewart, violent ravishing Christian Davidson, or being art and part thereof, not proven; and the plurality of the said members of assize, by the mouth of their said chancellor, find the aggravation libelled, in relation to Christian Davidson, not defi-

* See note on Maclean's case, N^o 2 1.

“ nitely proven ; but the whole affize, by their said chancellor,
 “ find it proven, that Captain Douglas, pannel foresaid, the day
 “ libelled, being about three quarters of an hour or thereby from
 “ his company in Mrs Brown’s house, and having returned to the
 “ said company, was questioned by some of them where he had
 “ been, to which he answered, he was getting a maidenhead, and
 “ showed his knee fyled [fouled] with black dirt, but condescended
 “ upon none [did not mention] whose it was.”

The court sentenced him to pay 300 merks Scots, of which ten for
 his Majesty’s use, the rest to Christian Davidson.

Act. Sir James Stewart.

Alt. Hugh Dalrymple, Skeen, David Forbes.

N^o 13.

February 8. 1697.

ELISABETH GORDON and his Majesty’s Advocate,

A G A I N S T

Sir GODFREY MACCULLOCH.

Murder.—Special verdict.—Capital sentence.

HE was indicted for the murder of William Gordon of Cairdines
 in 1690, after which he fled abroad.

The jury found it proved, That the pannel gave the deceased a
 shot in the leg beneath the garter, by which his leg was broke ; and
 that he died the same night.

The court adjudged him to be beheaded at the market-cross of E-
 dinburgh, and escheated his moveables.

Act. Sir Ja. Stewart, Sir P. Hume, Rob. Stewart senior.

Alt. Sir David

Thoirs, Hugh Dalrymple, Fergusson, Dav. Forbes. ——— Very long papers in
 this case.

N^o 14.

N° 14.

September 14. 1699.

His MAJESTY'S ADVOCATE,

A G A I N S T

JOHN MURDOCH and JANET DOUGLAS.

Adultery.—Arbitrary punishment.

THEY were capitally indicted, upon the law of God, and the Canon law, for adultery, aggravated by their being married persons, the man having a wife, and the woman a husband.

The libel was restricted to an arbitrary punishment; upon which they came in the King's will, and consented to be banished Scotland for life; and they were so accordingly.

N° 15.

September 14. 1699.

WILLIAM DOUGLAS of Dornock,

A G A I N S T

ROBERT CARMICHAEL Schoolmaster.

Murder.—Arbitrary punishment.

THE charge against him was, That understanding John Douglas, son to Douglas of Dornock, was to be taken from his school, he resolved to do the poor child harm; and for that purpose having bolted the door of his school-house, and caused two of the scholars hold the child's hands, he lashed him with whips of strong bend-leather till he was weary; and having rested himself, did so again; and thereafter drove the child's breast against the corner of a desk, which rendered the child senseless; notwithstanding he lashed him a third time, so that his buttocks and back became greatly swelled

ed and discoloured; last of all, he struck him betwixt the shoulders with the shaft of his whip, upon which the child died; and then Carmichael absconded.

The counsel for the prosecutor, Nov. 13. 1699, declared, they restricted the libel "to manslaughter, by malicious killing and slaying; and that they shall not libel nor prosecute the same as murder *ex insidiis*, or murder under trust."

He was sentenced to receive seven stripes in the Lawn-market, six at the cross, and five at the Fountain-well; and to be detained in prison till he find security to leave the kingdom, never to return, *under all the highest pains.*

N^o 16.

March 22. 1701.

HER MAJESTY'S ADVOCATE,

A G A I N S T

THOMAS ANDERSON and JOHN WEIR.

Commutation of punishment by the privy council.—Person who returned after banishment hanged.

ANDERSON having been condemned to death in 1694, and Weir in 1699, for falsifying the coin, the privy council *commuted* [changed] the sentence into banishment, they enacting themselves not to return to Scotland under the pain of death.

They returned, however, afterwards; upon which the privy council recommended to the court to fix a new day for putting the former sentence in execution. This was done; and they were hanged accordingly.

N^o 17.

1704.

Her MAJESTY'S ADVOCATE,

A G A I N S T

JAMES DRYSDALE and BARBARA TANNAHILL.

Incest capitally punished on a complete proof; arbitrarily on a defective proof.

THEY were indicted for incest, upon the law of God, the law of this and all other well-governed realms, and specially act 14. parl. 1. Ja. VI.—She confessed the crime.

The court, Jan. 22. 1704, found the libel relevant to infer the pains of death.

The jury, “all in one voice, find, That the said Barbara Tannahill her judicial confession, before the Lords of Justiciary, and the inquest, together with the concurring witnesses their depositions, doth sufficiently prove the indictment against her; but refers her retracting to the Lords themselves: And as to James Drysdale, we find nothing proven against him, except the woman's assertion, which is proven by concurring testimonies, together with her judicial confession; which is a great presumption of his guilt of the crime indicted.”

The court delayed pronouncing sentence for a considerable time; but at last they adjudged the woman to be hanged, and banished the man.

Adv. Advocatus, et alii.

Alt. David Forbes, Belsches.

N^o 18.

N^o 18.

June 25. 1705.

Her MAJESTY'S ADVOCATE,

A G A I N S T

WILLIAM BISSET and JEAN CURRIER.

Arbitrary punishment on a femiplena probatio of murder.

THEY were indicted for poisoning William Bisset's wife.—The jury found the crime proved by one witness.

The court adjudged Bisset to be scourged, pilloried, and banished to the East or West Indies; and Currier to be banished to the said plantations, and detained in the correction-house till an opportunity of transporting her offer.

N^o 19.

December 1705.

Mr David Drummond, Treasurer of the BANK, and the Cautioners of Robert Pringle, late Teller there, with concurrence of her Majesty's Advocate,

A G A I N S T

The said ROBERT PRINGLE.

Embezzlement of money in breach of trust arbitrarily punished.

THE indictment sets forth, " That where the duty of a servant
" is fidelity; and that the defrauding his master of his goods is
" evidently theft, theft under trust, and domestic theft; yet he, a ser-
" vant of the Bank as a teller, did, in December last, embezzle and
" steal the Bank's money, and thereafter fled; which occasioned a
" review to be made of his books and accounts, and a search of
" his

“ his drawers, by the creditors of the Bank*, with concurrence of
 “ a magistrate; when he was found to have run short, embezzled,
 “ or stolen, L. 425, 10 s. Sterling, as by his books and other evi-
 “ dence would appear; and when he was taken, certain sums were
 “ found upon him; and his crimes are aggravated by his obstinately
 “ refusing to discover how the rest of the money had been disposed
 “ of.” And the indictment concludes, “ That he should not only
 “ be decreed to restore *cum omni causa*, but punished with the pains
 “ of death, and confiscation of moveables.”

It was pleaded in defence, 1st, That he was no domestic servant, the Bank not being like a private *paterfamilias*; nor was he lodged and entertained in it. 2^{dly}, His trust was not as a servant, but as an officer; as such he found caution, and is liable *ex contractu* for damages. 3^{dly}, There could be no theft in this case; because money is a fungible, and he not liable for the *species*, but for the sum, which is a *genus*. 4^{thly}, There could be no theft; because the contraband of the money was *ab initio* with the consent of the Bank. In short, he could be in no worse situation than a fraudulent bankrupt, who is by statute only subjected to an arbitrary punishment.

The court found the libel relevant to infer an arbitrary punishment.

* In 1704, the Bank of Scotland (then the only bank in this country) stopped payment. The occasion will appear from the following resolutions of the general court of directors, that were thus entered in their books 15th December 1704: “ Payment being now stopped at the Bank, through the deficiency of cash, occasioned
 “ by extraordinary and unexpected demands within these twenty days past, upon a
 “ report of raising the value of money, industriously promoted and spread by some
 “ persons, and upon the real scarcity of cash all over the kingdom: Therefore my
 “ Lord President of the court of Session, Sir William Bruce, and Sir Robert Black-
 “ wood, (three of the directors), are appointed instantly to wait on my Lord Chan-
 “ cellor, and acquaint his Lordship of this emergent.” They having done so, re-
 “ ported, the privy council were to meet at six o'clock that evening. “ Ordered, That
 “ a representation be made to the council of this stop of payment, and the occa-
 “ sion thereof; and craving, That their Lordships may take inspection of the Com-
 “ pany's books, and see the sufficiency of the nation's security from the Bank.”

He

He confessed; and the jury found the indictment proved; upon which

He was sentenced to be set on the cockstool, [pillory], with a paper on his breast, describing his offence; and to be detained in prison till he satisfied the Bank, and relieved his cautioners.

Att. Da. Dalrymple.

Alt. Da. Forbes.

N^o 20.

1709.

HER MAJESTY'S ADVOCATE,

A G A I N S T

Robert Balfour, Master of BURLEIGH.

Murder.—Special verdict.—Judgement of death upon it, though it contained an absurd qualification.

THE indictment against Robert Balfour, eldest son of Lord Burleigh, commonly called *Master of Burleigh*, set forth, “That
“where by the law of God, and of this and all other well-govern-
“ed realms, the crime of murder or manslaughter is a heinous and
“atrocious crime, specially when committed upon set purpose and
“forethought felony, and ought to be severely punished; never-
“theless it was of verity, that he, shaking off all fear of God, and
“regard to her Majesty's authority and laws, did, upon the 9th, or
“one or other of the days of April, in the year 1707, moved by a
“most wicked and unaccountable malice, come to the town of In-
“verkeithing on horseback, and in arms, with two or three attend-
“ants; and having inquired for Mr Henry Stenhouse schoolmaster,
“and he appearing, he inquired at him, if he was Mr Henry Sten-
“house; and he having answered he was, he asked him, if he
“knew him; and he answering, No, he said to him, he was the
“Master

“ Master of Burleigh, and he had spoke to his disadvantage *, and
“ he must fight him, or words to that purpose; to which Mr Hen-
“ ry made answer, that he was not of his acquaintance; and that
“ he believed he had scarce ever spoke of him; but was sure he
“ had never said any thing to his prejudice; but he continued say-
“ ing, in these or like words, He must fight him with fire-arms on
“ horseback, otherwise he would shoot him; pulling out at the
“ same time a pistol, and bending it : whereupon Mr Henry did a-
“ gain make answer, excusing himself, and telling him, that it was
“ hard to oblige him to fight a man that he had never injured;
“ and that he had neither horse nor arms, but was in his night-
“ gown, teaching his scholars; and that it was against his princi-
“ ples to fight duels : and he still insisted in these or the like words,
“ He must fight, or be shot to death presently; and Mr Henry a-
“ gain excusing himself, he held the pistol to his breast, and told
“ him, if he would not fight him, that he would immediately shoot
“ him dead : and Mr Henry then said to him, if he must fight, or
“ be murdered, I’ll rather fight; thinking thereby to gain some
“ time to be rid of him : but immediately, and with the same
“ breath, he discharged his pistol against the said Mr Henry, and
“ shot him in the left shoulder with two balls; saying most info-
“ lently and cruelly, Take him that to be doing with, or words to
“ that purpose; and withal observing, that the said Mr Henry
“ did not immediately fall down dead, he pulled out another pistol,
“ saying, I have missed the dog; but the cry of the people arising,
“ he instantly made his escape; and having drawn his sword, rode
“ away at the gallop, crying all the way, to amuse the people, Hold
“ the deserter : of which shot and wound the said Mr Henry, af-
“ ter some days languishing, and that the endeavours of two phy-
“ sicians and three chirurgeons had proven ineffectual, died, a-
“ bout the 21st of the said month of April. By all which,” &c.

* The real ground of quarrel, it is said, was the schoolmaster’s having married, while the Master was abroad, a girl he had fallen in love with.

The conclusion is for the pains of death, and confiscation of moveables.

When his trial came on, July 28. 1709, he pleaded, Not guilty; and his counsel argued, the crime charged did not amount to wilful murder, or from malice prepenſe; and therefore it fell under her Majesty's general pardon. That it was not wilful, they inferred, from no circumstance being libelled that could occasion malice prepenſe: on the contrary, it appeared from the charge, that the parties were unknown to one another. — The priſoner came to the town on a market-day openly. — The wound was not in a mortal place, but in the arm; which ſhewed the priſoner did not mean to kill, but only to frighten or correct. — It was ſeparately pleaded, That the libel did not bear the wound was deadly; on the contrary, it admitted the deceased had lived ſeveral days after it; and the priſoner will prove *malum regimen*; and that the deceased was of a fretful diſcontented temper; *l. 30. § 4. ff. ad leg. Aquil.*

Answers were made for the crown, (which it is needleſs to infer, as the defences are palpably frivolous); and the court, after the debate, ordered informations to be given in to the clerk, in order to be recorded*. And upon adviſing theſe, Auguſt 3. 1709, they “ found “ the indictment relevant to infer the pains libelled, and repelled “ the defence of her Majesty's indemnity.”

The jury brought in the following verdict. “ Auguſt 4. 1709. “ They do, by the plurality of voices, find it proven, That the ſaid “ Robert Maſter of Burleigh was at the ſchool-door of Mr Henry “ Stenhouſe ſchoolmaſter at Inverkeithing, with piſtols, mounted “ on horſeback, at or about the time libelled; and likewise find it “ proven, That the ſaid Robert Maſter of Burleigh did diſcharge a “ piſtol againſt the ſaid Mr Henry Stenhouſe; as alſo find it proven, “ That the ſaid Mr Henry Stenhouſe was wounded in two “ places on his left arm, below the ſhoulder; and that he died “ within twelve days after he was wounded: but find it not proven

* By the 20th Geo. II. the court has a diſcretionary power of ordering informations, or not, as it ſhall ſee cauſe.

“ven, That the said wounds were given by the shot of the pistol discharged by the said Robert Master of Burleigh.”

It does not appear from the record, that any exception was taken to this verdict on the part of the prisoner; but the court adjourned consideration of it from time to time. The last adjournment, November 28. 1709, bears, “for several causes and considerations moving them,” they delay sentence till to-morrow.

Next day, November 29. 1709, they adjudged the prisoner to be beheaded at the cross of Edinburgh on the 6th of January 1710; and ordained all his goods to be escheat, &c.

Adv. Advocatus, et alii.

Alt. Naesmyth, et alii.

He made his escape from prison, dressed in his sister's cloaths: that disguise imposed upon the jailor, who allowed him to pass.

N^o 21.

February 1710.

HER MAJESTY'S ADVOCATE,

A G A I N S T

PETER MACLEAN, a dragoon.

Verbal injury, and an assault in order to take a soldier's gun from him, sufficient to restrict an indictment against him for murder to an arbitrary punishment.

THE charge against this man was, That, on the 3d of June 1710, he, out of a wicked and unaccountable malice, came up, with a fowling-piece in his hand, to James Ewan tenant in Tyllinglaine, who was standing unarmed in a vennel [lane] in the town of Montrose, and without provocation presented his fowling-piece to Ewan's breast, and shot at him therewith, and wounded him, so that he died in a few hours thereafter.

The

The pannel having pleaded, Not guilty, counsel were heard, and informations ordered*.

The information for the crown is as follows.

“ It was alledged for the defender, denying always the libel, That the same could not be sustained relevant, in regard that the defunct did give the pannel most intolerable provocation, by injurious words, and also by most treasonable reflections both upon her Majesty’s person and government; and therefore the pannel had just reason, by virtue of his office, being a foldier in her Majesty’s service, and at the time in her pay, to resent the same in the severest way.

To which it was answered, That, *imo*, the alledgeance flatly contradicts the libel as it is laid †; the libel bearing, That the said Patrick Maclean did, without any manner of provocation, present his fowling-piece, shot at the said defunct, and wounded him; of which wound he died.

But *2do*, The defence can never be admitted: for by what law are foldiers allowed to resent any verbal injury done either to themselves or their prince, after such a manner as to inflict, at their own hand, the utmost pains of law; especially seeing that the pannel being armed, and the defunct unarmed, the pannel might have seized and apprehended him, and sifted him before a proper judica-

* They are here inserted as transcribed from the record (which is very incorrect) in the course of Mungo Campbell’s trial, Maclean’s case being quoted as a precedent very favourable to Campbell’s plea.

† In judging of proofs, every thing sworn by a witness in judgement was held, by our forefathers, to be true: a position which indicates great integrity and simplicity of manners, but little knowledge of mankind. So far was this carried, that, till within a century and a half, a defendant was not suffered to alledge any fact contrary to those contained in the declaration or libel. The reasoning of our judges was to the following purpose: “ The pursuer hath undertaken to prove the facts mentioned in his libel: if he prove them, they must be true; and therefore any contradictory fact alledged by the defendant must be false.” *Historical Law-tracts*, vol. 1. p. 407.

ture for condign punishment, suitable to the nature of his offence? and it can never be pretended, that any man is *versans in licito*, who exceeds the bounds prescribed to him by law, which allows no man to resent verbal injuries by violent invading or attacking the defender's person: so that whosoever does so invade or attack another, must be answerable for the consequences thereof.

It was further alledged for the pannel, That the shooting of the said defunct happened by a mere accident, without any design in the pannel; in so far as the defunct having reproached him in the manner above mentioned, and then offering to invade the pannel, he, for his own defence, clubbing the fowling-piece, his sleeve taking hold of the lock thereof, did, without any design of his, go off, and wound the defunct.

To which it was answered, That this defence cannot be admitted, seeing it is contrary to the libel: for the libel bears expressly, that the pannel came up with a fowling-piece to the defunct, and, without provocation, presented the same to the defunct's breast, and shot at him therewith, and wounded him; of which wounds he died some few hours thereafter: so that the libel, as it is laid, is most unquestionably relevant.

2^{do}, *Esto* the defence were true, yet it acknowledges a most malicious design against the defunct; seeing that it is plain from the said defence with the clubbed fowling-piece, which might prove as sudden and effectual to take away the defunct's life, as the discharging thereof did; and seeing he was *versans in illicito*, he can never contend against the relevancy of the libel, or pretend to exclude the same, by alledging, that the defunct's death happened in another way than he designed it should have done, viz. by beating out his brains by his clubbed fowling-piece."

The information for the prisoner is as follows.

"The said Peter Maclean stands indicted, &c. The pannel being called to the bar upon his trial, denied the libel, as he still does; and informations upon the debate being appointed to be given in,
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the pannel, before answer to the pursuer's information, humbly craves leave to premise some general points in law, which found the presumption for the pannel, That if it shall be proven the fact libelled fell in his hand, yet there was no murderous design or forethought felony on his part; but, on the contrary, that, *quoad* him, all was but casual, or at most but culpable; and so not punishable *pœna ordinaria*, but arbitrarily allenary [only]. For,

1^{mo}, As there is not any cause or ground of previous malice, or forethought prejudice, on the pannel's part, libelled; so indeed was there none, nor was the pannel of the defunct's acquaintance; and it is not libelled that he knew him; *ergo*, what is alledged to have happened, presumeable to have been but the effect of casualty, or something else less culpable than the crime of murder or manslaughter libelled.

2^{do}, That the pannel's piece or carabine being upon his shoulder club-wise, and so with its muzzle naturally forward, might have been mistaken by the bystanders as if it had been presented to the defunct; and consequently, if the shot went off, the presumption is, that the off-going of the shot might have been occasioned by the stickle [trigger] its being ruffled or touched by the pannel's shoulder, or some part of his cloaths; and so the shot not necessarily ascribable to the pannel's alledged designedly firing at the defunct. But,

3^{tio}, And *esto* it should be proven, that the pannel's hand was at the work of the piece, as it is hoped it cannot, because his hand being so posted is not expressly libelled; yet several things might have happened that would exculpate the pannel altogether, at least from the ordinary punishment; such as, that the defunct quarrelled the pannel for carrying a fowling-piece, the defunct thinking that the pannel's carabine was such, the pannel being an English dragoon of the Earl of Essex's regiment, under Colonel Lucas, in her Majesty's service in Scotland; and about which carabine, as a supposing fowling-piece in manner libelled, and about hard words used both against the pannel and her Majesty's person and government, not fit to be expressed, and the defunct's thereupon invading the pannel for

robbing him of his arms, or doing him other mischief, might have occasioned a struggle on the pannel's part in his own defence; and in the which struggle, if the shot went off, it must be presumed to have either been casual, or at most but culpable, through an excess of that moderation of self-defence that law allows; and which excess, though in the disproportion of the arms made use of by the pannel, is but punishable arbitrarily, and not *pœna ordinaria*.

And this being premised, the pannel's true defences were,

That the defunct testified his unaccountable disaffection to her Majesty, as well as hatred and malice at the pannel; in so far as, though unacquainted, yet finding him in the English dragoon livery, with his carabine, which was doubtless lawful for him to carry, yet the defunct quarelled him, under the name of "rascal, how he durst carry a fowling-piece; and that if the Prince had his own, he durst not do so;" adding, that her Majesty was but a w——; and thereupon assaulted the pannel, for taking his carabine from him, or possibly for destroying the pannel himself, had he got in upon him, the defunct his outrageous expressions aforesaid importing no less; so that if in the struggle the piece went off accidentally, and killed, or if through the pannel's just grief, as well as fear and terror of what his fate would have been, if the defunct should get in upon him, the defunct being robust and strong, and having already vented so much of his malice, albeit wanting sword or deadly weapons; yet if the pannel, in his own just defence, fired the carabine, there was nothing in all that but a seeming excess only as to the *moderamen inculpatæ tutelæ*, with respect to the arms used by the pannel in his own defence, he ought to escape the ordinary punishment. For all which, and according to what the pannel's procurators promised to give authorities for in their information, *vide Menoch. De arbit. judic. lib. 2. caus. 278. De pœna excedentis defensionis modum quod sit arbitraria*, from the authorities of a vast multitude of the greatest practitioners in matters criminal. *Item vide Wesenbec. concil. 19. num. 57. Damboud. pract. crim. cap. 76. num. 14. Rullant de commissa, p. 4. l. 7. cap. 3. num. 17.*

where

where it is held as a principle, That “ si evidens immineat periculum, puta quod aggressor longe robustior et fortior sit, tunc etiam armis inermi resistere licebit; veluti si homo audax et qui alium proprio ipsius gladio extorto et adempto graviter percusserit, denuo aliquem sed nullis armis adortus, et jurgio prius excitato, deinceps pugno pulsare ausus fuerit; hoc casu, si infultatus duriori armorum genere hunc aggressorem repulsando trucidarit, a crimine homicidii excusandus videtur.” And the reasons for all this are, That as the law of nature allows of self-defence, so are not the proportion or disproportion of arms considered in law in a strict sense, or arithmetically with respect to the length, breadth, and sharpness of one weapon in comparison with another; but in a larger sense, and geometrically, as the law says, *i. e.* with respect to the strength, fierceness, and vigour of one man, though without any other arms than his limbs, or but a staff or rung, in comparison with an assaulted feeble man, though having a sword and deadly weapon: and the *ratio rationis*, why the not observance of the *moderamen inculpatae tutelæ*, in the case of a previous aggression on the defunct’s part, is not held to be a *dolosa omisso*, and so but arbitrarily punishable, is, That “ habenda est ratio justii metus, et animi irritati, et dolore affecti; quæ singula dolum excludunt;” for which *vide Stur. de vindict. privat. cap. 4. De defens. vitæ corp. et rer. aphorism. 7. n. 4. et aphor. 9.*

To all which it was answered, That, *1mo*, the alledgeance ought to be repelled as contrary to the libel, bearing, that the pannel, without provocation, presented his fowling-piece. *2do*, That soldiers are not allowed to resent verbal injuries done themselves, or their prince, at the rate of killing, especially when the defunct wanted arms; but that the pannel ought to have seized the defunct, and brought him to justice. *3tio*, That the pretext of the pannel’s piece being clubbed, shows his design of knocking the defunct dead, so that the pannel was rather on the offensive than the defensive.

Replied for the pannel, to the first, That, *1mo*, the libel, in saying

ing it was without provocation, is but negative, and can never preclude the pannel from alledging upon, and proving the positive qualifications of provocation, grief, and fear, condescended on in his said defence. 2do, The libel its bearing the pannel to have presented his fowling-piece to the defunct, was out of probable mistake of the pursuer's informers, because of the resemblance a clubbed piece has to a presented, *ut supra*; beside that *separatim*, the defunct's fierce threats, and assaulting the pannel, and fear of what the consequence might be, if the defunct had got in upon the pannel, would have justified even his presenting and firing, and that in his own defence, for the reasons aforesaid.

To the second, replied, That the verbal injuries are but alledged on by the pannel as aggravations of the defunct's assaulting him, and as further grounds of his just grief and terror of what might be the consequence if the defunct had got in upon him. And 2do, Albeit that the defunct wanted arms, yet his fierceness and strength of body was such, as the pannel was not match enough for him to seize him or bring him to justice, or yet to defend himself from being destroyed by him, had the defunct got in upon him.

To the third, replied, That upon the contrary, the pannel's attempting to club his piece, was rather an indication of his mind to beat off the defunct, rather than to kill him by shooting, because a knock, either on head or shoulders, was not at all so ready to kill as the shot. But 2do, The defunct's assaulting and invading the pannel to be in upon him, did put the pannel out of all his postures, so that albeit he had shot, yet the law, *ut supra*, mitigates and restricts the punishment of his so doing to that of arbitrary, because of the grief and fright he was in, that exculpates from all dolo, and renders the fact but punishable for want of that exact measure of moderation in his defence, that otherwise men in their composure, and without surprisal, might possibly have observed; and which want of exactness being at most but a *species culpe*, that in *criminalibus nunquam dolo equiparatur*, the fact libelled is therefore, by the principles of law aforesaid, but arbitrarily punishable allenaryly."

March

Feb. 1710.

The QUEEN against MACLEAN.

31

March 1. 1710. The Lord Justice-Clerk, and Commissioners of Justiciary, having considered the indictment at the instance of Sir David Dalrymple, her Majesty's Advocate, for her Highness's interest, against the said Peter Maclean, pannel, for the crime of murder, with the debate thereon, they find the indictment relevant to infer the pains of death; and sustain the defence proponed for the pannel in these terms, viz. That the defunct quarrelled the pannel under the name of "rascal, how he durst carry a fowling-piece, and "that if the Prince had his own, he durst not do so, and adding "these words, that her Majesty was but a whore;" and thereupon assaulted the pannel for taking his carabine from him, relevant to restrict the libel to an arbitrary punishment; and remit the same to the knowledge of an affize.

The trial proceeded, and three witnesses were examined for the prosecutor, who deposed, they saw Ewan immediately after he was shot, but none of them say they saw Maclean shoot him. The jury brought in a verdict, "all in one voice finding the crime, as "libelled, not proven;" and Maclean was affoizied, and dismissed from the bar.

Att. Kennedy, et alii.

Att. D. Forbes, et alii.

N^o 22.

June 5. 1710.

CHARLES HAY,

AGAINST

JOHN HAY.

Can Justices of Peace try subornation of witnesses, and without a jury?

CHARLES HAY, residing officer of the customs, having been indicted before the justices of peace of Edinburgh, at the instance of John Hay, comptroller of the customs at Prestonpans, with concurrence of the fiscal, for suborning witnesses, on act 80.

James

James V. and act 48. Q. Mary, offered a bill of advocation (*certiorari*) to the court of justiciary, on the following grounds.

I. Justices of Peace have no jurisdiction in capital crimes.

Ans. Even by our old law, the justices might judge in capital crimes, at least in quarter-sessions. This appears from the instructions 1661, which empower them to inquire into several capital crimes, and to certify them to the quarter-sessions or criminal courts; but by 6^{to} Anne, the justices of the peace in Scotland have the same powers vested in them that the justices of peace in England have, and they are appointed to take the assistance of one or more of the Lords of Justiciary in pronouncing sentence; now that the justices of peace in England may judge capital crimes, appears from act 18th Edward III. cap. 22.; and 34th Edward III. cap. 1.; and Dalton, *voce Felony*.

Replied, 1st, The instructions 1661 empower the justices not to judge capital crimes, but only to inquire and certify as to them. The act 6^{to} Anne gives no additional powers, but only such as are necessary for the preservation of the peace, and had been in use to be exercised by the privy council: and even by the law of England, the justices do not judge in capital crimes, but have only a power of inquiring into and certifying them to the justices of gaol-delivery; and the 18th Edward III. was restricted by the statute 1st and 2^d Philip and Mary, as Lord Hales, in his Pleas of the Crown, and Dalton, both observe. 2^{dly}, The crime libelled is not capital: for Q. Mary's act inflicts a lesser punishment than the former did. 3^{dly}, The defender has homologated the jurisdiction of the justices, by applying for a warrant to cite witnesses in exculpation.

Duplied, Queen Mary's act does not abrogate her father's; and it appears from Sir George Mackenzie's Crim. that suborners have been hanged since.—There can be no prorogation of criminal jurisdiction.

II. The Justices have committed iniquity in trying this case without a jury.

Ans.

Ans. They have been in the practice of trying cases not capital without a jury.

The Lords advocated the cause.

Adv. T. Kennedy.

Adv. David Erskine.

N^o 23.

1711.

HER MAJESTY'S ADVOCATE, and Jean Coulthard, relict of the deceased David Redpath gardener,

A G A I N S T

ARCHIBALD BURNET of Carlops, and Cornet James Loudon.

Homicide committed per plures in rixa, without weapons, not capital.

THE indictment against these gentlemen sets forth, That the said deceased, when walking inoffensively in the Canongate, without arms, and not having so much as a staff in his hand, was, upon the 12th August 1710, invaded by the prisoners, who beat him in a cruel manner; Burnet with a staff of broom, and Loudon with a cane; and after they had brought him to the ground, continued their blows; so that, when they left him, he was scarce able to crawl into a neighbouring house, where he died next morning; and that when surgeons were called, they found his head bruised and swelled, a great deal of extravasated blood in certain places, &c.

The Lords, upon advising long informations, January 22. 1711, found the libel relevant; but sustained the defence, That the beating was *per plures commissum*, in conjunction with any of the two following defences, viz. That any beating committed by them was in a *tuilzie* or *rix*a, in which they mixed themselves to relieve a youth in the defunct's grips, or in a struggle with him; or, *separatim*, That they had swords about them, and only made use of staves or battons, relevant to restrict the libel to an arbitrary punishment.

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The verdict returned by the jury was as follows. "Jan. 22. 1711. They do, by a plurality of voices, find, That Archibald Burnet of Carlops, pannel, did, about the time and at the place libelled, strike at and beat the said David Redpath gardener with a big staff, such as was produced in court; and as to Cornet James Loudon, the other pannel, they do all in one voice find, that he the said Cornet did strike at and beat the said David Redpath gardener with a small cane, and continued to do so, likewise about the time and at the place libelled; and that the said David Redpath gardener was dead on the 14th day of the said month of August; and that as to both pannels, the beating was *per plures commissum*; and that they both had swords about them, but did not make use of them."

The court fined Burnet, January 31. 1711, in L. 100 Sterling, and Loudon in L. 50, to be paid to her Majesty's receiver-general; and ordered them to be detained in prison till they produced a sufficient voucher of the payment.

Att. T. Kennedy.

Alt. Hen. Wallace, Dav. Forbes.

N^o 24.

June, August 1712.

Sir DAVID DALRYMPLE of Hailes, Baronet,

A G A I N S T

LUDOVICK GRANT of Grant.

May a lawyer, who was, when King's Advocate, consulted by a party, accept of employment on the other side, upon his being displaced?

This being a most extraordinary case, the papers in it shall be given as in the record, though incorrect; omitting, however, such passages as contain nothing but personal reflections.

THERE was a petition presented to the said Lords by Sir David Dalrymple of Hailes, Baronet, humbly shewing, That where,
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in the criminal pursuit at the instance of the Laird of Grant elder, against Grant of Mullochard, and others, and the recrimination at the instance of the said Mullochard, and others, against the said Grant, the petitioner did appear as procurator for Mullochard: and the first question which occurred being, Whether the libel of recrimination should be read before the debate on the principal libel? the petitioner, as procurator for the defender, did yield, that the debate on the principal libel should precede. And thus he not only compared, but acted for the defender without objection.

But when the petitioner came to make the reply in the debate, the pursuer did interrupt him, and made a verbal complaint, "That he having been consulted by him on the subject of the principal complaint, and knowing the secrets of his cause, could not plead against him:" And afterwards explaining himself, he added, That the petitioner had been consulted after the libel was drawn before it was executed; and after it was executed, he had been advised by the pursuer before the compareance; but acknowledged he never advised the petitioner since.

On the other hand, the petitioner did not impugn these facts; but added, That at first when the case was brought to the petitioner, he told, that he had been consulted by young Grant's commissioners (the defender in this cause) long before, about the right of possession of the house of Grant, (the main subject of the principal libel); that he did apprehend the pursuer would make nothing of the complaint; and that he behaved, in all questions concerning the possession, to be for his son and his commissioners; but however, being at that time Queen's Advocate, it was his duty to concur *ratione officii*; and if he saw just cause of complaint, he promised he would do it as he ought, heartily. When the pursuer himself came to the petitioner the second time, he told the same thing: and at both times he did offer what good offices he was capable of for settling the difference; which he accordingly did endeavour: and besides that, he plainly intimated to the pursuer his concern for his son in manner foresaid. He did, and does say, here were no secrets of the pursuer propaled, nor

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could

could be, the subject of both libels, being matters of fact, open, and to be proven. And to these things openly averred by the petitioner in court, nothing was, nor indeed in justice could be, opposed by the pursuer.

This, as near as he can remember, was the state and substance of the facts in this verbal complaint on both sides; to which he could add other circumstances, but he confines himself to what was before their Lordships. Upon which their Lordships did not pronounce any formal interlocutor, but did publicly give it as their opinion, that the petitioner should leave the reply to be managed by another; which he did.

But give the petitioner leave, in a point so nearly concerning him, with due respect to represent,

imo, That he detests the practice of deserting a client, and going over to his adversary, or the betraying the secrets of a cause: and besides the testimony of his own mind, (which enables him to despise the consequences of this ill-founded complaint), besides also the presumption of law for innocence, (the common benefit of mankind in civil societies), he has had the honour to be many years in the profession of the law, he hopes he may, without offence, say, not obscurely; and he defies this complainer, or any other whatsoever, to lay the least charge against him of having acted fordidly or unworthily: and he does contend, that by law, in such cases, a complaint that does not carry something of more than ordinary weight and probability, ought not to be admitted; at least such complaints require the plainest evidence: but by the facts in this case, there appears no deserting of his client, no secret, no betraying; for long before any pursuit, he was consulted for Colonel Grant and his commissioners; nor did he conceal it, or pretend to serve the pursuer, in any question concerning the possession. In the next place, he told, and the thing itself speaks, that he consulted, in order to concur in his then office; and indeed he was bound by that office, if just cause should appear, to concur freely, and would have done it.

But

But all this was *ratione officii*: and truly so soon as the Queen laid him aside*, the pursuer, from what he declared to him, (as he thinks), looked on himself as no longer concerned with him; nor did he dream the petitioner had any concern with him; on the contrary, he had entered the court on the defender's side, and had appeared for him in the first question without objection.

If indeed the pursuer had employed him when he had no office, the question would have come to that, — Whether a lawyer neglected, may not change his side, especially where he has never given an opinion to his first employer, or cannot be charged with having in his power to betray writs or secrets? And though the petitioner has prescribed stricter rules to himself than the law requires, yet the famous Mattheus was of opinion, a lawyer, in such a case, might change his side: “*Et privati advocatum, si non callide atque perfidiose renunciaverit, sed a litigatore dimissus sit, adversario ejus operam dare posse fatemur; sibi enim imputare debet litigator, si patronum, cui omnia causæ merita perfecta sunt, dimiserit, cum potuerit, ac debuerit, certe cogitare quid sit eventurum;*” *ad tit. De prevar. cap. 1. § 5.* And he will venture to affirm, that no court in Christendom has at any time found a lawyer blameable in such a case: and he could prove, that the contrary obtains, were that his case; nay, that it has been done by the greatest, and by men of as fair character as ever wore gowns.

But where, by his office, he was a joint pursuer, as is usual, and where he did not dissemble his concern for the other side, that when that office ceased he should not be left at liberty to appear for his first client, is wholly new, and without positive laws or example at home or abroad; and that, he humbly conceives, is a solid exception in matters of complaint or censure.

It was indeed noticed, that to consult the Queen's Advocate at raising of a libel was usual; but if he was consulted before comparance, it is presumed to be *ob vindictam privatam*.

* Sir James Stewart was admitted Queen's Advocate, 8th November 1711.

But,

But, with submission, *1mo*, This distinction has not yet the authority of any law or practice in any other case to support it. *2do*, To consult in the one case is just as usual as in the other; but in both it is but a matter of decency only; that since the Queen's Advocate, by his office, is of necessity a joint pursuer, the party who insists for private interest should, out of regard to him, as such, instruct him in the cause when it is to be tried. *3tio*, If there were any real difference, the advising of a libel to be raised, is a more close act of consulting the *vindicta privata*, than the concurring after it is raised. *4to*, There could lie no blame against the petitioner to consult, where he had no choice to concur or not, and where he told his engagements, if his office had not made his concurrence necessary.

But, *5to*, In matters of complaint, and tending to some censure, it seems natural to follow the common maxims. The question is, *Quo animo* he consulted with the pursuer? for the *animus* distinguishes and gives form to the fact. If he did, as by his office it was, and must be owned; for if it had not been taken as granted in the reasoning in court, it would be cleared beyond contradiction, that that office ceasing, the petitioner is free. If he did it as a private lawyer, it is thought he is not. Since then, without absurdity, it may be ascribed to the first, the law says, "Semper in dubiis benigniora præferenda sunt, in pænalibus causis benignius interpretandum est. Rapienda est occasio quæ benignius præbet responsam." The question is, What my intention was? The law says, "In ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset." Interpreting mens words or actions, "ea potius accipienda significatio quæ vitio caret." Besides, when this consulting might be ascribed to the one or the other cause, it is in law applied to that character *qui prævalet*, to the *jus nobilius*. And as these general rules do presume, that my concurring and advising was *ratione officii*; so, on the other hand, there is no maxim, observance, or statute, to presume, that the second consultation was on another foot than

than the first, or that either were on any other account than *ratione officii*.

But, in the next place, give the petitioner leave to make just remarks (as he hopes) on the form and method of his complaint. It was owned, that the complainer had given him no notice of it beforehand; that he had not desired his service of late; and *de facto* he had compeared for the defenders without objection.

From whence he does, with humble respect, contend, That first he could not except against his compearing, having once admitted, and even given occasion to it, by neglecting the petitioner.

But, in the next place, are complaints of this kind to be made, if it had been even against a macer or a door-keeper, without being given in in writing? Your Lordships know better than he, that the office of advocate is by lawyers called *laudabile et nobile officium*; that the faculty is the nursery of the bench, and under the favourable protection of the law and judicatures, as a considerable part of the college of justice; on that account it was in law the more necessary to have let him know his accusation, and his accuser. He might add, that he has had the honour to be in several considerable stations; and does defy the complainer, and all men else, to charge him in failing in point of probity in his profession. He dare appeal to their Lordships, and to his country, on that head; and for that reason also it was an atrocious injury thus by a public calumny to attack him by surprise. The petitioner does ascribe it to a boundless malice, that would carry the complainer to murder him in the dark, if he had opportunity: for he that attempts his credit so groundlessly, assaults him in that which is dearer to good men than life itself; and the poor pretence of being a pursuer is too thin a cover to veil such intemperate malice from the eyes of God or men.

But, 3^{tio}, As to the substance of the complaint and conclusion, that he could not plead against the complainer,

1^{mo}, The privilege to plead is the petitioner's private right, established, and cannot be restrained or diminished, but by his consent, or by his fault.

2^{do},

2do, He will not trouble their Lordships with the authorities which might be adduced from the practice of other courts. The petitioner does not in this case, he never did in any case, nor as he hopes ever shall need, to justify himself from those examples that touch on the utmost lawful liberty may be used by lawyers with regard to their clients.

This only gives the petitioner leave to observe, that for an advocate who has been consulted for a private party, to appear, after he is made Queen's Advocate, against that party in the same cause; or for the Queen's Advocate, after he is laid aside, to appear on the other side, in those very causes that have been pursued by him, is *triti juris*; and yet, in all these cases, the secrets of causes may be pretended to have been opened; and if such bare pretences were sufficient to infer a crime, no name of office could excuse it: and therefore the complainer did necessarily add, that the petitioner was in the secret of the cause.

But neither is this alone sufficient by the laws of any nation, unless it be added, that these secrets have been revealed; and in that case the lawyer transgressing is to be punished, though he had the pretence of a supervening office to excuse him. But now in this allegation there behoved to concur two facts: 1mo, That there were secrets; 2do, That these have been propaled; both of which in this case are not only false, but redargued from the nature of the cause. The subject is open facts to be proven; there is no confession, private or public, of parties; no instructions in writing made use of: the knowing of the secrets is therefore a bare pretence.

The petitioner has thus far taken it for granted, that the Queen's Advocate, being consulted at the raising of a libel, by a private party, was not concerned in the *vindicta privata*, but was understood only to be advised *ratione officii*, as has been said.

But for farther clearing of that point, the petitioner offers the following reasons.

1mo, Their Lordships admitted that fact as certain, as indeed it is, viz. that besides the ordinary fee for concurrence, which is *necessitatis*,

cessitatis, it is usual to give the Queen's Advocate a honorary fee of course, and out of respect, because the concurrence lays him under the necessity to be a joint pursuer; and this being given *ratione muneris*, does not bind him longer than the office continues, no more than the salaries from the Queen during the office, restrain his freedom after the office ceases. The petitioner has already urged, with good reasons, as it is hoped, that the advising of the Advocate in both cases, is for the same cause, and common practice.

2do, This being the custom undeniable, and that no secret custom, but known to all that have experience in such matters, it was not censurable in the petitioner, unless he were charged with propagating secrets, which in this case is foolish to pretend.

3tio, The petitioner's patent does contain all rights and emoluments his predecessors enjoyed; these voluntary and honorary fees were such, and therefore are his private right.

4to, If their Lordships should think that this matter was first irregular, and ought to be reformed; or that it is an abuse, which not being complained of till now, cannot now be approved by interlocutor of court:

For removing this difficulty, the petitioner offers, *first*, That those observances or customs which are notour, need not any sentence directly to confirm them; the notoriety, and silence from the beginning till now, implies the consent of the lawgiver, especially *ad hunc effectum*, to excuse *a dolo vel culpa*. 2do, There is in this case no inherent or real wrong: the fee for the concurrence is the same that is given in improbations *ad civilem effectum*; but with this difference, that in actions of improbation the Lord Advocate is at freedom notwithstanding of his concurrence. It is not unreasonable he should be instructed in the cause. And indeed his concurrence, and these consultations, are for two ends. One is, that though he cannot judge of complaints to be raised, so as to reject them; yet if they contain things *contra bonos mores*, or notoriously calumnious, he may and ought to refuse so much as the concurrence of course. But, in the next place, even after that concurrence is given, and he has been in-

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formed, both at the giving of the concurrence, and in order to compear; yet he is not tied to appear personally, except he be convinced that there is a real breach of peace, or that the public are concerned, because of the atrocity of the fact; and then his appearance is *ratione officii*, even when he is instructed, and got fees from the parties. And the office being a dignity, an office of state, it is not presumed that these honorary fees, given of course, can influence him to do wrong. This could be made clear from a multitude of instances, over and above the constant practice at home, particularly from that of the Attorney-General in England and Ireland, whose perquisites of this kind are very great; and from the case of sentence-money, which is the practice in many sovereign courts, and was once the practice of the session, and obtains in inferior courts to this day*; in all which cases the dignity of the persons excludes the presumption that they can be tempted, for furthering their own gain, beyond what is right.

5to, As this is at best a question concerning what is decent or expedient, in which men may have different sentiments, it is certain, that except some regulations were made, (and by the by such regulations of the Queen's Advocate's office and fees is somewhat beyond common regulations), there is no law, and consequently no transgression: nor would a regulation now to be declared affect him, or the Queen's gift in his favour; for even laws *futuris tantum dant normam negotiis*.

And seeing this is a matter of more importance than the principal cause at the complainer's instance against the defenders; and that a whole life of doing as becomes his profession, and the common presumptions and rules of law do concur to interpret the circumstances fairly for the petitioner; and that no man, without deep prejudice, can think, that he would throw up or endanger his own credit, for the poor temptation of an ordinary fee or consultation in a single cause, where he could have no special reason to concern

* It was abolished by 20th George II.

himself:

himself : And therefore craving it might please their Lordships to consider the foresaid complaint, and vindicate him against so public an injury, by just punishment on the complainer ; as the said petition bears.

Which being, upon the day and date of thir [these] presents, heard in presence of the said Lords, with an addition made thereto, therewith given in, they, by their deliverance thereon, ordained the Laird of Grant to see and answer the same against Monday next."

The addition here mentioned is not to be found in the record ; but it appears from the answers for the Laird of Grant, that it did not contain much new matter, and that it was made in the form of an additional petition, and the substance of it seems to be recited in the answers, which, after giving a summary of the two petitions, proceed as follows.

" Before he make any answer, he must acknowledge, that if the petitioner had either out of court told him he had a mind to desert him, or asked the favour of him in court to allow him to do so, the complainer had readily granted it, since he did not think the fate of his cause did depend on his pen or eloquence : but when he, in a most affronting and prevaricating manner, at first seemed to deny his receiving his fees ; and when he offered to prove it instantly, he in a most insulting way said, he owned the fact, yet would stand to his privilege ; therefore the complainer was necessitated, upon that new injury, to insist for their Lordships decision ; which, after inquiry into the fact, and his judicial acknowledgements, their Lordships determined him to yield to other lawyers in this cause ; whereupon he expelled himself the house with some very indecent expressions : and he now has given in a petition, whereby he in effect makes himself a party against the complainer, and it seems he designs to have it on record ; and so vocky [vain] he is of this petition, that all the coffeehouses have got it. The complainer need answer no more, but it is *res confessa et judicata*, which excludes the complaint, and might excuse him from this trouble if the petitioner pleased ; but since, notwithstanding of his own said confession, and

the Lords sentence interponed thereto, he is still pleased to call his so challenging him in court a public calumny, the complainer shall here add an irrefragable document of his being consulted as his lawyer.

When the complainer raised this process, he first consulted Sir James Stewart, now Lord Advocate; and because he could not get Sir David to meet with his Lordship, he got from him a memorandum, by which he was to raise his libel; which when he had brought to Sir David, he caused amend the same in several places, and made very considerable alterations therein, as appears by the foresaid memorandum, written by James Spence, my Lord Advocate's servant, his hand, and scored and figured by Mr Buchanan, Sir David his servant, produced in the clerk's hands; and according to these amendments, his libel is wrote out, and letters raised; for which he consulted him suitably besides his ten merks: how then could this gentleman think that, *illæsa conscientia*, he could plead against him in this cause? And when the letters were returned, he was again consulted; which he thought was sufficient till the cause should come to be pled. And it is calumnious in the petitioner to say he deserted him. The fact itself tells otherwise; and he being twice consulted before once hearing, in a process of this kind, is all that ever was done with any advocate, and all that he did with his other lawyers. And that he did not send to him to put him in mind of the complainer, which is all the desertion the petitioner can alledge he was guilty of, might say something, if the question were, Whether he should plead for the complainer or not? but to say, that that could ever be a sufficient reason for the petitioner to go to the other side, and plead against him, is what he truly thinks no man but the petitioner will say. And after the letters were returned execute, he again consulted him: so he never doubted of his assistance, at least that he would not compear against him.

This being the true fact as to this, the force of Matthæus's citation falls to the ground; for he says, "Si advocatus dimissus fit a
" litigatore, operam dare potest adversario;" and the reason subjoined,

sibi

sibi imputet. But here the complainer denies he dismissed him, which proves itself; nor did he acquaint the complainer that he engaged with his adversary. And to the citation out of Matthæus, it is answered, *first*, That it is wrong quoted; for although he mentions, that “*privati ergo advocatum, si non callide atque perfidiose renunciaverit, sed a litigatore dimissus sit, adversario ejus operam dare posse fatemur; transfugam sine crimine posse negamus;*” these last words “*transfugam sine crimine posse negamus,*” is left out of the quotation, which makes downright against the petitioner. *2do*, That citation does not meet the petitioner’s case; because there the advocate was a *litigatore dimissus*, which was a downright quitting of him, and laying him aside, that he might do what he pleased, which cannot be pretended the complainer did in this case.

And the engaging of a lawyer being of the nature of a contract *locati*, cannot be dissolved but by mutual consent. And the pretence of the petitioner’s disengaging himself, by the complainer’s not objecting against his first judicial compearance, seems captious; especially when he does not know if the fact be true, at least he observed it not; and if it was done, it might be explained for me by the petitioner’s rules of ambiguities; since he had a mind to nail it, he ought to have taken instruments there, upon a *primus actus judicii*, &c.

Neither can it avail him to say, Because the Queen had laid him aside, therefore he thought he had done so too; for her Majesty might have had other reasons, not fit for the complainer to penetrate into, than he had; and it is a bad *sequela* from the prince to the subject, when he is prosecuting his private right, and had laid open to his advocate his whole affair. And the complainer must own, that the reason he adds for changing sides is pretty odd, That he advised his son’s commissioners to take the possession of the complainer’s house, and yet advised him to recover it. If that be not *fisci nomine privatas calumnias commovere*, against the *l. 3. Cod. Advo. fisci*, he leaves to their Lordships to determine.

As for his candour and integrity, he does not otherwise quarrel it
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at present, but by this fact represented, which is his own experience. And as for his two precedents, he humbly contends, they can neither screen him, nor introduce a custom against law for his practice. In the first case, her Majesty against the tacksmen, is against an express text in the *Codex*, l. 1. *De adv. fisci*, where the Emperor Antoninus says, “Eos qui causam fisci egissent prohibitum est adversus
“fiscum patrocinium præstare;” and that even in the case *ubi salarium percepisse neges*, which it is hoped Sir David will not deny was paid him liberally by her Majesty. And this admits of no exception but a positive allowance, as in the l. 2. *Cod. eod.* which is not pretended Sir David had, and in that case the Queen’s counsel did not object it.

As to Sutherland’s case, it is singular, and how far justifiable he cannot say; but probably it has been of consent of parties, being openly acknowledged before pleading, and so might be indulged.

As for the *animus accipientis*, he shall not determine, whether it was *calumniandi* or *lucrifaciendi animo*; but sure he is, the *animus dantis* was to engage him; and in contracts of this kind, *animus dantis* as well as *accipientis inspicitur*, which on the *locator’s* part is collected *ex interventu pecuniæ*. The complainer heartily allows the petitioner, that the *munus advocati* is *laudabile et nobile*; yet the l. 6. § 5. *Cod. De post.* says, “Si lucro præmiaque capiantur, veluti abjecti et degeneres inter vilissimos numerabuntur.” And Brunneman, *ad leg.* 1. *Cod. De adv. fisci*, has these words: “Nam illiberale est, ob non solum salarium, causam deferere, etiam privati nedum fisci, et probari non potest; quod gloss. ob non solum salarium patrocinium deferere posse dicat: et multo minus dicendum est, ob hanc causam patronum privati posse adhærere parti alteri; quod quomodo sine prævaricatione fieri posse non video, et ideo hic recte gloss. iam improbat.” Barbossa, who, upon the same law, observes, that “advocatus qui ob non solum salarium ad alteram partem con-
“volat in regno Neapolitano, certum, non solum maxima reprehensionem dignus fuit, verum poena non levi plectendus veniret.” And if the petitioner pleases to look over *Franc. Mar. Delphin. decis.* 664. num.

num. 3. and *Gabr. Alva De privileg. paup.* a Spanish lawyer of very good account; and *Paulus Christianus*, vol. 3. *decif.* 170. num. 23. he will there see how much the practice of changing sides in this manner is cried down; and if, for not being paid of their fees, a lawyer is not allowed to change sides, how far less for the poor pretext of the complainer not sending to him when his cause was to be pled?

As to his second complaint against their Lordships, That the complaint was not in writing, and that he did not give him notice,

It is answered, That there is no necessity of an objection and incident complaint being in writing, which is usual to be decided *de plano*; and if he had desired it he should have got it, for he offered to prove it in the form. And as to giving notice, it supposes a depending plea; but since he had not dismissed him, nor he given him notice that he had deserted him, he was under no necessity to acquaint him that he was to make the objection.

To the additional petition, it is answered, *imo*, It begs the question, That the retaining fee is given *virtute officii*, and yet he owns it engages him to be for the pursuer: but then he says, he is tied to the pursuer no longer than his commission continues from the Queen; which cannot be well understood, unless the *vindicta privata* were necessarily tied to the *publica*; which it is not, since this may be indemnified, and yet that remain due to the private person. *2do*, As to the custom, the same is denied, except with himself. *3tio*, It is thought his patent does not empower him to unwarrantable deeds; and it is an unjust reflection to burden his predecessors or successors with such unjust practices. To the *fourth*, It is not necessary to make a regulation where the thing never occurred before, and that the common law is express. It is frivolous in him to defend the *mala praxis* by notoriety; for the same is denied, and wrong can have no warrant: and the fact is sufficient to show him, that the process was not *contra bonos mores*, and *ex eventu* is found relevant by their Lordships. So that his allegations from the English and Irish attorney-generals practice is not good, since he does not vouch the same from any authority;

thority; and he could make the contrary appear from their lawyers if necessary: but whatever may be in that, he doubts much if the attorney-general would protect the petitioner in any courts of England, if he acknowledged corruption, and the receiving double fees from both sides beyond the known allowance of ten merks. And his office of state is ill pled since the union; and particularly in this case, where the fact is not very honourable; as is the argument from *Sportulæ*, which by the law was allowed; whereas going to the other side, either in private or fiscal cases, was always reprobate. 5^{to}. No body approves the decency but himself; and the *l. 6. § 1. Cod. post.* says, “Si quis adeo procax fuerit, ut non ratione, sed probris putet esse certandum, opinionis suæ imminutionem patietur; nec enim conniventia commodanda est, ut quisquam negotio derelicto in adversarii sui contumeliam aut palam pergat, aut subdole.” And to say, that because his pursuit consisted in facts to be proven, and therefore no secret to be revealed, is a jest; for by that rule, an advocate might, at any time, change sides in a criminal process, which entirely consists of facts; to reveal which is as great a crime as the discovering of writs in a civil process: and so judges Matthæus, in the very place the petitioner cites him; where he says, “Si in facto causa consistat,” as in this case, “placet quod Bartolus scripsit, et post eum Alietus; eum qui id fecit, non tam prævaricationibus reum fieri, quam incidere in legem Corneliam de falsis, eo capite quo cavetur; ut poena falsi coerceatur ille qui instrumenta alicujus penes se deposita prodiderit adversario ejus: nam si procurator alicujus id fecit, humilior in metallum damnatur; honestior in insulam relegatur, publicata dimidia parte bonorum;” as is clear from the *l. 38. pa. 8. ff. De penis*.

Upon the whole, as the complainer made his objection against the petitioner out of no manner of design of injury or reflection, but purely self-defence; so now he has been forced to answer this angry petition upon the same footing; which he hopes their Lordships will think he has not deborded [deviated]: And though, upon very good grounds of law, he could crave the petitioner to be punished, as
many

many texts of the Civil law provides; *vide l. 1. Cod. De advo. divers. judi.* "Si patronum causæ prævaricatum putes, et impleveris accusationem, non deerit adversus eum pro temeritate commissi sententia," and *l. 38. § 8. De penis*, and the authority of many lawyers; and that the petitioner his allowing himself so much liberty in venting his groundless passion upon the complainer, might justly provoke him thereto; he is satisfied at this time with defending himself, and craving, that the desire of this petition may be refused; as the said answers bear.

There was a second PETITION given in to the said Lords for the said Sir David Dalrymple against the said Ludovick Grant, humbly shewing, That he having given in a petition, by way of complaint, against Ludovick Grant of that Ilk, to their Lordships, on Monday last, for his necessary vindication, on account of an unjust complaint made against him by surprise, some days before; and he being appointed to see and answer, has taken occasion to publish a false and defamatory libel, in a most scurrilous and atrocious manner, adding new injuries to the former; the petitioner must once more beg leave to lay before their Lordships some of many particulars for just redress.

In the *first* place, He humbly intreats, that his former complaint may be advised, and the grounds and facts as therein contained; for these facts being the very substance of what was admitted in the first hearing, and as to which the said Grant neither does nor can be allowed to vary, the case is fully before their Lordships. The petitioner will not trouble the court to examine the ill manners, the ill reasoning, nor the misapplication of the authorities with which the Laird of Grant has stuffed his answers. The petitioner's case is plainly set forth in his petition; to which he adheres.

The Laird of Grant now adds, That the memorandum for raising the libel was brought to the petitioner. And so indeed it ought to have been, he being at that time Queen's Advocate. But he says, The petitioner amended the libel. He ought to have told in what particulars; for if the petitioner would not give concurrence to any

thing he thought indiscreet, or obviously vexatious, it was his duty so to refuse. But here, by the by, he must observe, the pretended scored libel ought to have been exhibited in the clerk of court's hands with the answers; but it is kept up for another surprise. This is certain, he did very much blame the heat in both libel and recrimination; and before he concurred, caused, as he thinks, smooth the one and the other. Now, for all the sputter of his being engaged for the *vindicta privata*, the petitioner dares say, even the Laird of Grant will not say he advised him to raise his libel, approved of it, or ever gave an opinion in the cause, or made any note or information for managing the debate; which he neither would, nor could have shunned, if he had been engaged as a private lawyer. If Grant forget, others who were present will not.

But the said Laird of Grant says, he did not desert the petitioner, for he had consulted him twice; and in his confused way of telling the story, one would think he had done it oftener: but if he means so, it is false, and beyond what is alledged in court.

Now that the said Laird of Grant did desert the petitioner, is certain, (notwithstanding all his reasoning); for in such cases, all that ever was done by way of neglect on a client's part to a lawyer, was, that after a long surcease, he renewed the cause, instructs his other lawyers, without calling on the person he intended to dismiss. It was never known that a client did command a lawyer not to appear for him. The Laird of Grant, by the words in the first line, fol. 3. seems to think, that he ought to have sent him word, that the petitioner had, or was to engage, with his adversary: but he does mistake himself; an advocate who is neglected, is not bound to beg employment so meanly.

In the *next* place, Though the Laird of Grant had asked his assistance, he would not have complied, nor could not: for having concurred only with him because he could not do otherwise, and having told him he was for his son, he could not, after he was at freedom, be for him, but behaved to be for his first client. Besides, as he was a concurring pursuer of necessity in the principal libel,
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he was, by the like necessity, a pursuer in the recrimination; and therefore being no longer under that necessity, though he had not been first employed for Colonel Grant, yet it was optional for him to concur as a private lawyer with the one or the other, since he could not appear for both. It is upon this footing that he is and was in the right; and the constrained reasonings and authorities are as far from the purpose as railing is from reasoning, or as falsehood and malice are from truth and innocence. These authorities concern the cases of corruption and betraying, the acting fordidly and doubly; a practice which the petitioner despises and abhors; and his own conscience, as well as his country, will bear him witness, that he is groundlessly and maliciously charged with a fault that is as little his character, as witchcraft, or robbing on the highway.

The petitioner is under a necessity, in general, to observe, that the said answers to his petition do neither candidly resume it, or give a fair account of what passed in court. He says, That the petitioner at first, in a most affronting prevaricating manner, seemed to deny his receiving his fee; and when he offered to prove it instantly, he did, in a most insulting way, justify it. But he says this very falsely. The petitioner did, and does deny, that he was employed, or took fees, except *ratione officii*; and that he was consulted at the raising of the libel, he never did deny. And though, in the first surprise, he did not so very distinctly remember that he was consulted when the letters were returned; yet he did not deny it, but admitted it; and therefore the charge of prevaricating is false, as most other things in the answers are.

The said Laird of Grant further says, That the whole matter is *confessa et judicata*. The last, the petitioner dares say, is false. The court has pronounced no formal interlocutor, nor have the Lords given any judgement that can hinder him to examine the case; and for the former, it is *res confessa*, if the whole facts be to be taken together; and in that issue the petitioner puts that complaint.

As to the authority vainly brought from the Emperor Antoninus, the petitioner says, that the republic and empire of Rome had lived

long without that law; and it needed a positive edict to establish it. Next, that law never took place in Scotland and England; and there is no man who wears a gown that does not know it. It was admitted in the reasoning of the court, that the Queen's Advocate being engaged only *ratione officii*, the office ceasing, that engagement ceaseth: and if an ordinary advocate, becoming the Queen's Advocate, is not only at liberty, but bound to appear against his first client, it necessarily follows, that changing of sides, considered in itself, without perfidiousness, or betraying of secrets, does not import any turpitude; for if it did, no name of authority or office could excuse it. Nor is this the only case in law of that kind; the same happens in the syndics of towns, and is expressly decided in the case of a tutor who had been advocate against his pupil's father, *l. ult. ff. De postulando*: and therefore the appearing for the Queen is only *ratione muneris*; or, as this learned answer says, *ex mandato*; the mandate being revoked, it ceases: and the practice of other sovereign courts, allowing the same person who has appeared for the Queen when he was her advocate, to appear against her when he is laid aside, is of greater moment than the eloquent studied turns in the answers to the contrary. The judges in the session and exchequer know full as much of the matter of law as the drawer, and of the customs of other places; and it was *pars judicis* to have debarred the advocate, if it had been irregular for him to appear.

Indeed, in any case, for an advocate to desert *perfidiose*, or merely because he gets not his fees, when perhaps his client's circumstances do not allow the charge, or to do fordidly, or betray the secrets *aut vino tortus aut ira*, or less, yet for gain, is highly censurable. These, and the like cases, have been condemned; and to these belong the citations, just in themselves, but impertinent to the purpose. But since this is mentioned, give the petitioner leave, in a word, to observe, that Matthæus is misunderstood in the answers. He pretends to quote fair, but seems not to understand the sense of the last part of the section cited, nor indeed of the first. The first part mentions a distinction which Matthæus approves, that *si in facto causa consistat*,

a lawyer must not change; but then *in fact* in this sense is where there are writings and secrets, as the words cited in the answers, fol. 4. show. What the drawer observes about the misciting the last words in his petition, is poor trifling. Matthæus is in every one's hand; and he, with the due skill of law and Latin, will decide whether he means as the petitioner has said or no.

To conclude, The petitioner did, and does, with all submission, plead the honour of his profession, that he be not thus scurrilously used. The debasing the bar, which is, as Valentinian says, *seminarium dignitatum*, and especially of our greatest courts, is a debasing of these benches that are to be filled from thence; and their answers complained of, do afford a present instance of it, in the way of speaking of the Lords of Session: and though the Laird of Grant could find *some unnatural member, perhaps, to suggest citations* nothing to the purpose, and some few wretched turns; yet it is plain, he has not yet found any lawyer so prostitute as to own so scurrilous answers. And therefore craving, &c.

Answers were given in for the Laird of Grant to the second petition; which contained no argument, but an apology for the warmth of expression in his former paper, to which he had been, he said, provoked, and the acknowledgement of a mistake as to one fact relating to another cause.

Aug. 1. 1712. The Lords Justice-Clerk and Commissioners of Justiciary, having considered the second petition given in for Sir David Dalrymple, with another petition given in for him, and an addition thereto, with answers given in to all by the Laird of Grant elder; they refuse the desire of the said petitions, and additional petition: And further, that the opinion of this court, in a very material point, may not be misunderstood, by occasion of some passages contained in the foresaid papers given in by the said Sir David Dalrymple, the said Lords Justice-Clerk and Commissioners of Justiciary declare it to be a mistake, that they allowed, that the Queen's Advocate might take fees from a private

vate pursuer, not as the said private pursuer's advocate, but by reason of his office as Queen's Advocate.

JAMES ERSKINE, *I. P. D.*

N^o 25.

November 3. 1712.

Her MAJESTY'S ADVOCATE,

A G A I N S T

JOHN GRAHAM.

Casual homicide.—Forty days elapse before trial finished.

HE was indicted for the murder of David Cochran.

The court found the libel relevant to infer the pains of death; and sustained the defence, That while the pannel was attacked by Blyth with a drawn durk, the pannel was in his own defence with a drawn bayonet, and that in the mean time the defunct, interposed as a redder between them, did casually receive the wound libelled, relevant to restrict the libel to an arbitrary punishment.

December 10. 1712. A motion for deserting the diet *simpliciter* against him was made by his counsel, on the act 1701, in regard that the forty days had elapsed, and ten days more, for which the trial had been delayed at the pannel's desire.

The court "deserted the diet *simpliciter*, and dismissed him from "the bar, in respect nothing is proponed or craved for which "he should be remanded to prison."—He was afterwards outlawed for not appearing.

Adv. Solicitor Sir Ja. Stewart.

Adv. Sir D. Forbes, Ja. Graham.

N^o 26.

February 9. 1713.

The Procurator of the CHURCH, with concurrence of her Majesty's Advocate,

A G A I N S T

The Magistrates of ELGIN, and Mr David Blair Episcopal minister there.

Judgement of the Court of Justiciary reversed by the House of Peers.

See a full account of this case below, under that of Murdison and Miller, in 1773.

N^o 27.

March 12. 1713.

Her MAJESTY'S ADVOCATE,

A G A I N S T

JEAN RAMSAY.

Murder.—Special verdict.—Arbitrary punishment.

SHE was indicted for the murder of Robert Ramsay, a poor weak infirm person, charitably brought off the street into the house of one Isabel Lesly in Leith, and there laid in a bed; out of which she dragged him, and beat him on the head, to the effusion of his blood, with a pair of iron tongs; and after he was laid in another bed, she also dragged him out of it: by all which violence and barbarous treatment he died in a few hours.

The defences were, *first*, No malice against the defunct is charged; she only wanted to get him out of her bed, so at most only *homicidium culpofum*. *2dly*, The wounds are not libelled to be mortal. *3dly*, The deceased was in a dying condition when brought into the house, and

and therefore his death ought to be ascribed to his sickness, not to her strokes.

The interlocutor, on the relevancy, found “the pannel’s violently dragging the defunct, a weak and infirm person, out of the bed on which he was laid, so that his head was bled on the bedstock or floor; and her beating him on the side with a pair of tongs; and her again dragging him out of another bed whereon he was afterwards laid; and his dying within a few hours thereafter, about the time libelled, relevant to infer the pain of death, and confiscation of all her moveables, goods, and gear; and find any of the aforesaid facts separately relevant to infer an arbitrary punishment: and repel the haill defences,” &c.

The jury found that part of the libel, “anent dragging a weak filly man out of a bed, upon a chest and floor, and that thereby he was wounded and bled, and the said weak infirm man was dead about eight o’clock next morning, proved.”

The court sentenced her to be scourged, and banished the shire.

Adv. T. Kennedy.

Adv. Colin Mackenzie.

N^o 28.

March 16. 1714.

Her MAJESTY’S ADVOCATE,

A G A I N S T

JAMES MAGNAB.

Murder.—Special verdict.—Arbitrary punishment.

HE was indicted for the murder of Thomas Maccormic.

The jury found it not proved what person gave the defunct the wound of which he died; but found it proved, the pannel had his sword drawn at the time and place the defunct received the wound, and that the pannel, when seized, had his sword stained with blood.

The

Sept. 1715.

The KING against BAILLIES.

57

The court adjudged him to be carried to Crief, and there scourged on two market-days.

N^o 29.

September 1715.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

WILLIAM and JOHN BAILLIE.

Commutation by the Privy Council of a sentence of death into banishment.

—Libel for returning from transportation, in breach of the condition in the Privy Council's sentence, sent to a jury.—Forgery competent before the Justiciary in the first instance, but remitted to the Session, because the mean of a proof indirect.

THE indictment contained three several accusations. The *first*, against both pannels, was laid upon the act 13. parl. 20. James VI. which punishes forners *, vagabonds, and common thieves, commonly called *Egyptians*, with death; and it charged that the pannels were such, and specified several acts that brought them under that description, at least that they were habite and repute Egyptians, which is, *per se*, sufficient to infer the pains of death. The *second* accusation was against William only: it charged him with being art and part in forging and using a forged pass or certificate; and was laid upon the common law, and act 22. parl. 23. James VI. The *last* accusation too, respected William Baillie only: it set forth, That he had been formerly, in 1699, convicted of the same crimes, and sentenced by the justiciary to be hanged: That the privy council had commuted this sentence into banishment; but under this expresse condition, that if ever he returned to this country, the former sentence should be executed against him; and that

* i. e. sojourners who force people to give lodging, meat, &c.

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he gave bond, under the penalty of 500 merks, “to obtemper the
“fame, by and attour [besides] undergoing of the said pains of
“death in case of contravention thereof.” Which sentence, and ap-
pointment of the privy council, he had manifestly contravened, by
his returning again to Scotland.

Several defences, in point of law, were offered for the pannels;
and as to the last charge, in the information for them it was argued,
“*first*, That the sentence of the privy council does not contain any
“such certification as that the persons therein named should incur
“the pain of death in case of their return, but only the bond
“granted by these persons is under the penalty, which has only been
“enacted *ob majorem terrorem*; it being certain in law, that no man,
“by a paction, can bind himself to do any deed under the pain of
“death: but the council’s sentence itself must have born *in gremio*
“of it, and as a nullity or irritancy of the commutation, that in
“case of their return, they should incur the pain of death, and the
“commutation become void; which it does not do, only appoints
“them to grant such a bond, which, if the matter be rightly con-
“sidered, can never be effectual in law. *2dly*, That if the pannel
“had returned, and thereby could have incurred the certification
“of the bond in 1699, his returning would have fallen under the
“indemnity: yet this was not proponed in the debate; both be-
“cause the pannel positively informed he was not the same person;
“and that this would still be competent, even after the verdict,
“however the probation should happen to go.”

September 6. 1715. The interlocutor found a special relevancy, as
to the first article in the indictment; and also found “the said Wil-
“liam Baillie his being convict at the time and of the crimes li-
“belled before the Lords of Justiciary, and thereupon sentenced to
“death; and thereafter the said sentence being, by the Lords of
“his Majesty’s Privy Council, commuted to banishment, upon an
“enactment to depart forth of his Majesty’s dominions to America,
“never to return, under the certification and pain of the said first
“sentence, *separatim relevant for having the said first sentence put in*
“*execution*

Feb. 1717.

KEY, &c. against MACNEIL.

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“ *execution* against the said William Baillie. And as to the crime of
“ forgery, or using of false or forged passes, libelled against the said
“ William Baillie, the said Lords *find the court competent to judge*
“ *thereupon*; but in respect it appears from the debate, that the on-
“ ly means of improving the said passes are indirect, therefore re-
“ mit the same to be tried by, and cognosced summarily before
“ the Lords of Session; and repel the haill defences; and remit to
“ an assize,” &c.

September 7. 1715. The jury brought in a special verdict as to the forning, but said nothing at all as to any other point: all they found proved was, That William, in March and April 1713, had taken possession of a barn without consent of the owners; and that during his abode in it, there was corn taken out of the barn; and he went away without paying any thing for his quarters, or for any corn during his abode, which was for several days; and that he was habite and repute an Egyptian, and did wear a pistol and shable, [a kind of sabre].

Upon this, September 8. 1715, the pannels were dismissed from the bar.

Att. Solicitor Sir Ja. Stewart, Duncan Forbes. *Alt.* Sir Archibald Sinclair, Robert Alexander.

N^o 30.

February 15. 1717.

ROBERT KEY, and his Majesty's Advocate,

A G A I N S T

HUGH MACNEIL.

Remission.—Affythment.

HE having been indicted for the murder of James Key, produced a remission; upon this the crown-lawyers, who were discharged by it to proceed, deserted the diet. But for the private

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party it was objected, *first*; That such remissions were discharged by act 1503, and 1593, c. 178. *2dly*, The word *slaughter* in the remission cannot apply to murder, but to manslaughter, which is distinguished from murder, as the lesser crime from the greater, act 1593, c. 173.; and from the narrative of the remission, it appeared to be granted on supposition that the fact was as therein set forth; but the state of the case in the remission is contrary to the libel, therefore the remission must be supposed to have been obtained by subreption, *Voet, lib. 48. tit. 23. § 7.* *3dly*, No remission can be admitted, without at the same time awarding an assythment, act 178. parl. 13. of James VI.

Answered, Remissions may be stopped in exchequer, or before the Lord Keeper of the Great Seal; but neither subreption nor any other objection is receivable after a remission has passed the seals, *Mackenzie, p. 274.* Our Kings have granted remissions in some cases, even without an assythment.

The court ordered the pannel to be set at liberty, upon his finding security to pay such assythment as should be modified by the Barons of Exchequer.

Adv. Sir D. Dalrymple *Adv.* Sir Ja. Stewart Solicitor.

Att. Ja. Graham.

N^o 31.

December 16. 1717.

HIS MAJESTY'S ADVOCATE, the Procurator for the Church,
and the Moderators of several Presbyteries,

A G A I N S T

Mr ALEXANDER ROBERTSON, and six other Episcopal Ministers.

Judgement of the court of Justiciary appealed from by the Crown-lawyers.

IN this case, a verdict having been returned against the pannels,
the court decreed them to restore and give up several churches,
manfes,

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manfes, glebes, and utenfils, under the penalty of L. 10 Sterling; and fined them in L. 25 Sterling among them, to be paid to the procurator for the church for the ufe of the purfuers, in name of damages; and decreed them to find fureties not to trouble or moleft, &c. each under the penalty of 500 merks Scots; and difcharged them to preach or exercife, &c. within their refpective parifhes; and ordained them to be imprifoned until they paid the faid fums, and found fecurity.

After this fentence, the record bears, "Mr Robert Dundas moved "for delay of fentence, in refpect he had feveral reafons to offer, not "proper to be mentioned in open court." But this was refused, "in "regard the fentence was already figned, and the motion made after "figning and booking."

Upon this Mr Dundas "reprefented, That the faid fentence being to the lefion of his Majefty's intereft, and that of the "private purfuers, therefore he appealed to his Majefty and the "Houfe of Peers for redrefs againft the faid fentence; whereof " (meaning his reafons of appeal) the tenor follows."

The reafons are introduced with obferving, that the fentence would be prejudicial to his Majefty's intereft, and tend to the encouragement of his enemies. They go chiefly upon this, That the penalty impofed was trifling and elufory, not being a fixth part of the real cofts; that the prohibition is limited to the parifhes therein mentioned, fo that the pannels might preach any where elfe, and difturb other parifhes. The reafons are eight in number: the laft in fubftance imports, That the fentence feemed to have been fomething precipitately gone about; that on his firft hearing it, he moved for a delay, that he might lay before their Lordfhips the bad confequences of fuch fentence; and that though this was not done till after figning, that was of no confequence, efpecially confidering that the court did not as ufual declare their opinions *viva voce* from the bench, fo that he had no opportunity of knowing their fentiments till after the fentence was figned and booked; which he conceived was not agreeable to the practice of the court, or to the act of parliament,

parliament, which ordains causes to be advised with open doors; therefore he protested for remeid of law, and took instruments in the clerk's hands, and required extracts.

This appeal was never prosecuted. — See below, under Murtherfon's case, in 1773.

N^o 32.

March 1719.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

Ensign WILLIAM BEAVER.

Beating a Minister of the Gospel.

HE was indicted for beating Mr John Henderson minister of the gospel at Kirkden, knowing him to be such; aggravated by his speaking contemptuously of the church of Scotland.

It was set forth in defence, That the pannel was, when in liquor, invited into the company where Mr Henderson was, by Provost Lanet; and a dispute about religion having arisen, the pannel said something in favour of the church of England; upon which Lanet spit in his face; and the pannel having put his hand to his sword, Henderson bade him lay by his sword; upon which he did with a cane beat Henderson, whom he did not know to be a minister till next day, when he went and asked his pardon; of which submission Henderson accepted, and they drank together.

In point of law he pleaded, That the private party being satisfied, in such a trifling affair as this, action should not be sustained at the instance of the Advocate: for *diffimulatione tollitur injuria*; the offence is abolished by it; and therefore the fact can afford no ground of prosecution to any party.

Ans. 1st, The discharge or remission of the private party cannot exclude the public. 2^{dly}, The act of parliament (this was not libelled

Aug. 1720.

The KING against MACGREGOR.

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led on) gives a title to prosecute to the Advocate, procurator for the church, or any other person ; because it is the interest of the public, that clergymen should be protected ; and it was easy to see, that, from Christian forgiveness, they might put up with injuries, on slight acknowledgements, or even feigned repentance.

The court found, *Feb. 23. 1719*, " his beating with his fist or stick Mr Henderson, the time and place libelled, after he was told, or was in the knowledge, that Mr Henderson was a minister, relevant to infer the pains of law contained in the 27th act 10th parl. Ja. VI. and 7th act 1st parl. Charl. I. ; and repel the whole defences proponed for the pannel," &c.

The jury, all in one voice, found " the libel proven in terms of the interlocutor."

March 2. 1719. The court decerned and adjudged him " to have forfeited, amitted, and tint, [lost], all his moveable goods and gear, to be applied in the terms of the act Ja. VI.; and decern and ordain him to be instantly carried to the tolbooth of Edinburgh, there to remain until the 12th March instant ; and thereafter to be dismissed upon the said day."

N. B. The indictment is laid on the laws of the realm in general, not on any particular act.

Att. Ro. Dundas.

Alt. Duncan Forbes.

N^o 33.

August 1720.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

ALEXANDER MACGREGOR *alias* Campbell.

Escape from prison by stealth punishable.

THE indictment charged, That he having been committed to the tolbooth of Edinburgh by a warrant from the Lord Justice-

stice-Clerk, did, on the 7th March, "violently, or at least by
"stealth, break his said imprisonment, and made his escape out of
"the said tolbooth."

Pleaded in defence, Breaking prison with violence may be relevant, as it is a breach of the peace, and the walls of the prison are in some measure sacred; but escaping without violence cannot be reckoned a crime: *Ignoscendum est ei qui sanguinem suum qualiter redemptum voluit.*

Ans. Breaking with violence is the more atrocious of the two, but both are liable to an arbitrary punishment; for the offence of the crime consists in a contempt of public authority, and both are of most dangerous consequences.

August 4. 1720. The court found "his coming out of prison by
"violence, or by stealth, the time libelled, and the place, relevant
"to infer an arbitrary punishment."

August 9. 1720. The jury found the indictment proved; upon which the court sentenced him to be imprisoned till 15th September then next.

Att. Solicitor Walter Stewart.

Alt. John Forbes.

N^o 34.

November 1720.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

N I C O L M U S C H E T.

Murder.

THE indictment sets forth, That notwithstanding, "by the laws of God, the laws of nature, and the laws of this and all well-governed realms, the crime of murder, more especially the horrid and barbarous murdering of his own wife, is prohibit, and punishable with the severest pains; likeas by 153d act 12th parl. Ja. VI. it is

Nov. 1720.

The KING against MUSCHET.

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is statute and ordained, seeing that divers exceptions and objections rise upon criminal libels, and parties are frustrate of justice, be the alledged irrelevancy thereof, that in time coming, all criminal libels shall contain, that the persons complained on are art and part of the crimes libelled; which shall be relevant to accuse him thereof; so that no exception or objection take away that part of the libel in time coming: yet true it is, that he was guilty, art and part, of the foresaid horrid and barbarous crime of murdering his own wife; in so far as, upon Monday the 17th of October last, or one or other of the days of the said month, he did, in a most cruel and barbarous manner, under cloud of night, carry Margaret Hall, his spouse, to the King's Park at Holyroodhouse, and then and there did wilfully and wickedly murder her, by cutting her throat almost quite through, and giving her several other wounds, whereof she died; which being found proven, or it being found proven that his wife was, at the time and place aforesaid, murdered, and that he was art and part of the murder, by such facts and circumstances as shall be brought in evidence, and proved against him, by the verdict of an assize, he ought," &c.

Nov. 29. 1720. On a motion from the prisoner, the court recommended to three counsel to plead for him; and found the libel relevant to infer the pains of death, and confiscation of moveables.

Dec. 8. 1720. He confessed the crime; upon which he was found guilty by the jury, and adjudged to be hanged by the court.

Att. Solicitor Walter Stewart.

Alt. Horn, Elphinston, Charles Erskine.

N^o 35.

November 22. 1722.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JOHN TROUBLECOCK, Soldier.

Murder.—Special relevancy.—Special verdict.—Capital sentence.

HE was indicted for the murder of John Barclay, corporal, in a squabble.

The court found it relevant, That the pannel was heard to quarrel with the deceased, and found struggling with him; and that the deceased was found wounded in the neck, and of that wound did immediately die; and that the pannel thereupon endeavoured to make his escape; and that the bloody bayonet, which was found lying near to the place, did belong to him.

The jury found the pannel's endeavour to make his escape proved only by one witness; and all the other parts of the interlocutor proved by concurring witnesses.

The court adjudged him to be hanged.

Att. Adv. et alii.

Alt. James Ferguson, et alii.

N^o 36.

1723.

HIS MAJESTY'S ADVOCATE, and James Carruthers, Waulker,

A G A I N S T

Colonel FRANCIS CHARTERIS of Amisfield.

Rape.—Husband may prosecute the ravisher of his wife, though the advocate withdraw his concurrence.—Special verdict.—Damages and expences awarded.

THE libel set forth, "That where, by the laws, &c. the ravishing of women, the violent carrying away of a woman
" from

“ from one place to another, for satisfying the ravisher’s lust, the
“ unjust oppressing of a woman against the King’s peace, by forc-
“ bly lying with her, or abusing of her body, are crimes of a high
“ nature, and punishable with the severest pains; yet true it is
“ and of verity, that the said Colonel Francis Charteris of Amisfield
“ is guilty, as actor art and part, of the foresaid crimes, or one or o-
“ ther of them; in so far as the said Colonel Francis Charteris, sha-
“ king off all fear of God, and regard to his Majesty’s laws and au-
“ thority, having, upon the 2d day of January 1722, or one or o-
“ ther, &c. met with Janet Watson, wife of James Carruthers, the
“ said complainer, as she was passing on the highway, near to Dun-
“ woody green, in the stewartry of Annandale, the said Colonel
“ Francis Charteris did then and there violently attack or seize upon
“ the said Janet Watson; and notwithstanding of her cries for help,
“ and of her struggle and resistance, carried her some space off the
“ high-road, and forcibly had carnal dealing with her; at least, the
“ said Colonel Francis Charteris, after the said Janet Watson was
“ on the ground, did discover her nakedness, by throwing up her
“ cloaths; and having his breeches down, was lying above her, the
“ said Janet in the mean time crying out, thereby giving evi-
“ dence of her unwillingness, and of her abhorrence of the rape
“ committed upon her; and which crime, horrid and atrocious in
“ itself, and for that reason declared one of the pleas of the crown,
“ is highly aggravated with the heinous sin of adultery, by being
“ perpetrate and committed by the said Colonel Francis Charteris, a
“ married man, with the said Janet Watson, a married woman: All
“ which, or one or other of the facts above mentioned,” &c.

The Solicitors, after the libel was read, declared they did not in-
sist in this cause; but the private prosecutor insisted to the full ex-
tent of the libel, and that the pannel should be punished with the
pains of law, according to his demerits. The Colonel pleaded, Not
guilty; and his counsel stated a variety of defences both in point of
fact and of law. The court ordered informations.

It was set forth in point of fact for the pannel, That he had not,
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and could not, have committed a rape on the prosecutor's wife; for she was a strong young woman, he an infirm unwieldy man, who had had the misfortune to break his leg long ago, which had rendered him lame, as must be obvious to every person that looks at him: besides, when he met this woman he was in his boots and great coat. The prosecution was altogether vexatious, instigated by his enemies, who had bribed this prosecutor to insist, and taken very unjustifiable measures to prevail on the woman to give a declaration against him; which, however, had not been done for ten months after the alledged crime.

It was objected in point of law, That as the public prosecutor had withdrawn his appearance, the private party had no title to insist for punishment.

Answered, The concurrence of the Advocate is not necessary; and it is not in his power to quash criminal trials. Private parties have always had a title to bring those who injured them to trial: if they, from having transacted with the criminal, will not do so, the advocate may. This is clear from act 140. parl. 13. Ja. I. and act 76. parl. 11. Ja. VI. which gives the King's Advocate a power to prosecute if parties be silent; and so Mackenzie understands in his observations on these acts. In this crime, by statute 1612, private parties have a title to pursue.

Replied, A private party wronged has no doubt a title to prosecute for reparation and damages; for so far he has an interest: but not for punishment; that belongs to the *vindicta publica*. Could private parties prosecute for it, the King's remission would not avail: but it is certain the King may remit the punishment, though he cannot stop process for reparation. Nor is there an instance of a prosecution for the pains of death, or other punishment, without the concurrence of the Advocate. The act 4. parl. 21. Ja. VI. supposes, that the concurrence of the Advocate is to be given; for it statutes, the consent of the woman shall not exempt offenders from punishment and penalties at his Majesty's pleasure; which supposes and implies the concurrence of his Advocate; and the requiring this concurrence is a proper and
wife

wife check against malicious prosecutions. At any rate, though on such concurrence being refused, it were competent for the court to authorise a prosecution *ad vindictam publicam* at the suit of a private party, that the court would never do but *causa cognita*, and upon examining a precognition, to see whether the Advocate had good cause for refusing to concur.

Obj. 2. The prosecutor would not bring this action till he got money to do so, and two obligations, one for L. 30, another for L. 800, in the event of the pannel's being convicted.

Ans. This will not take away the crime, though it might shew an officiousness on the part of the prompters of the prosecution; but those who supplied the prosecutor with money did nothing wrong, but rather what was right.

Replied, It is a good objection against admitting a party to prosecute, that he has taken money to do so; and the law punishes this as a species of falsehood; *l. 4. ff. De accus.;* *Voet. Comm. ad tit. De acc. § 7.;* *Matthæus, lib. 48. tit. 3.*

Obj. 3. By law, this crime, if not recently pursued, cannot be pursued at all. The *Reg. Maj.* required complaint should be made in twenty-four hours; and though that may have been departed from in practice, yet surely a long delay is the strongest evidence there was no violence; and must therefore either cast the process altogether, or be admitted in exculpation before the jury. In this case no complaint was made for ten months; and the woman for a long time denied she had been ravished, and did not alledge that to have been the case till undue influence was used with her.

Ans. 1. Though the woman should now deny the rape, that, by statute, would not bar the process. 2. Such circumstance can signify nothing, as a proof is offered of the crime. 3. As to the delay, the pannel went to England immediately after the crime, and was on his road thither when he committed it. A considerable space of time is requisite, in order to make proper inquiries into the fact, and the witnesses by whom it can be proved. Was a prosecution to be hurried on, fatal errors might be committed.

Obj.

Obj. 4. The libel is too general, as it does not charge a continuance of force, nor sufficiently particularise the circumstances of the force said to have been used. Crying and resisting is natural to the sex when willing; and no man would be safe if these were sufficient to infer a rape.

Ans. It is charged, that she was violently seized and carried off; that she cried and struggled when on the ground, and the pannel above her: From such circumstances, in every case, it is to be presumed the woman was unwilling to the last; or if willing, that *odioſis artibus circumventa et inducſta fuit*. In this case she struggled to the last, and that is clearly sufficient.

April 4. 1723. The court pronounced this interlocutor. “ Sustain
“ proceſs, and repel what is alledged againſt the competency; and
“ find the libel relevant to infer the pains of law; and repel the de-
“ fences proponed for the pannel; and remit the pannel and libel
“ to the knowledge of an aſſize.”

Two or three witneſſes were examined for the proſecutor; and the jury, *Nov.* 12. 1723, brought in this verdict: “ By plurality of voi-
“ ces find it proven, That the pannel was ſeen lying above Janet
“ Watſon, the complainer’s wife; and found it proven, That while
“ they were on the ground together, the ſaid Janet Watſon was
“ heard cry out.”

Nov. 18. 1723. The court adjudged the pannel to pay L. 300 Ster-
ling to the proſecutor for damages and expences; and that he be
imprifoned till he make payment.

Act. Alex. Hay, *et alii.*

Alt. Peter Grant, *et alii.*

July 1724.

The KING against DICKSON.

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N^o 37.

July 1724.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

MARGARET DICKSON.

*Childmurder.—Revealing relevant to restrict to an arbitrary punishment.
—Recovery after being hanged.*

SHE was indicted for child-murder upon the act 1690.

It was pleaded for her in defence, That she is a married woman, though she has lived separate from her husband for ten months past; and that the act had always been understood to be applicable only to unmarried women, as those who have husbands are under no temptation to murder their children. *2dly*, and separately, She would prove that she revealed her being with child to certain persons before the time libelled.

August 3. 1724. The court found “the libel, as founded upon
“the act of parliament 1690, relevant to infer the pains of death,
“and confiscation of moveables; but sustains the defence of her re-
“vealing her being with child, relevant to restrict the same to an
“arbitrary punishment*.”

The jury found the indictment proved, and the defence not proved.

The court adjudged her “to be hanged by the neck upon a gibbet till she be dead,”—in the common style: and she was hanged; but, by mistake, not till she was dead; for after being cut down, she recovered perfectly, lived many years, and had

* In the case of Elisabeth Orrock, 21st February 1715, in which the defence, That she had revealed, was found proved, as well as the indictment, the court sentenced her to be scourged at Edinburgh and Dunbar. The same judgement was pronounced, on the same day, in the similar case of Elisabeth Johnston.

several

several children by her husband, who cohabited with her notwithstanding all that had happened to her.

Act. Binning.

Alt. Arch. Murray.

N^o 38.

December 7. 1724.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

GASPER REYSANO, Stabler.

Murder.—Special verdict.—Arbitrary punishment.

HE was indicted for the murder of Robert Lamb.—The interlocutor on the relevancy restricted the libel to an arbitrary punishment. The jury found it proved, "That the pannel did throw
" the deceased from the door of his dwelling-house, backwards,
" down the stair; by which fall the deceased received a bruise or
" wound on the head, or right ear, whereof he died next morning."

The court sentenced him to be transported for life.

Act. Binning.

Alt. Hew Dalrymple senior.

N^o 39.

1727.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

MARGARET NISBET, spouse to Alexander Macleod wigmaker in
Leith.

Forgery.

THE indictment set forth, "That where, by the laws of this
and all other well governed realms, the crimes of falsehood
and

and forgery, or counterfeiting any obligation, bill, bond, or deed whatsoever, or falsifying any person's subscription, or the using any forged or false writing knowing the same to be such, either in judgement or outwith the same, or being art and part in the counterfeiting, &c.; likeas by the municipal law and practice of this kingdom, the makers, feigners, users, and falsifiers of such writings, are punishable, sicklike as it is provided by the disposition of the common law, both Canon, Civil, and Statutes of the realm, and with the pains due to falsehood, which are the pains of death, and confiscation of moveables: Nevertheless," &c.; and then it charges the forgery of a bill and other writings, all which writings, false and forged, were fabricated, or procured to be fabricated by her; who for that end used many wicked and devilish contrivances, and endeavoured to support the same by base and abominable means: And upon production of these writings before the Lords of Session, the falsehood and forgery of them was found proved; as also that she was guilty, and art and part of the said forgery; as the sentence, dated at Edinburgh 8th December 1726, remitting her therefore to the Justiciary, bears. All which, or any part thereof being found proved against her; and particularly it being found proved, that the said writings were found to be fabricated, false, or forged, by the said sentence of the court of session; and that she, by the same, was found guilty, or art and part of the said forgeries, or any of them, she ought to be punished with the pains of death, and confiscation," &c.

Pleaded in defence, 1. Falsehood is not punished with death by any statute. The Civil and Canon law, which is referred to in our statutes, punished persons guilty of this crime *pro qualitate admissi*, but never with death.

Ans. This crime has, in innumerable instances, been punished with death, even before the 2d act 23d parl. James VI. Theft is punished capitally with us, though there is no particular statute inflicting that pain, and theft is implied in forgery; and in many cases the Civil law does punish forgery with death.

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2. The relevancy cannot be reckoned sustained, and yet less proved, by the decree of the Lords of Session; they not being judges in the first instance, further than to annul and improve the deeds. Nor was the proof they went upon sufficient evidence here; for *testibus, non testimoniis, credendum*.

Ans. Mack, tit. Falsehood, § 4. thinks the Session the only proper court for trying this crime. This is going too far; but it would be a still greater excess, to dispute the jurisdiction of the Session, which has been exercised for more than 100 years, as to this crime, and many criminals condemned to death on remits from that court. Mackenzie likewise expressly teaches, that the decree of the court of session is *probatio probata*; and observes, that in the case of Binnie, in June 1666, the jury having refused to condemn upon it, they were *inclosed of new*. An assize obliged to find a pannel guilty, upon the decree of the Session, is put under no greater hardship than this court is, when it condemns a criminal on the verdict of a jury; and if this practice was to be overturned, forgers would always escape.

February 3. 1727. The court found, "That the pannel, the times libelled, being guilty of forging the bill and obligation or declaration libelled, or that she, the pannel, was art and part thereof, relevant to infer the pains of death, and confiscation of moveables; and repelled the haill defences," &c.

Then the decree of the Session was read in court.

The jury, all in one voice, found, "That by the said decreet the libel is proven, and the said Margaret Nisbet the pannel is guilty art and part of the crimes libelled."

The court adjudged her to be hanged, and she was executed accordingly.

Adv. Ch. Erskine.

Adv. Rob. Craigie, Ja. Graham junior, James Cochran.

N^o 40.

January 12. 1730.

WALTER MACMINN,

A G A I N S T

The Procurator-Fiscal of the Stewartry of KIRKCUDBRIGHT.

Sentence by a sheriff, proceeding on the verdict of a jury, reversed.

MACMINN having been found guilty, by a jury, of stealing an anvil, the steward fined him in L. 200 Scots, and banished him the stewartry.

He offered a bill of suspension upon these grounds: 1st, The libel was not relevant, as it did not charge the suspender with stealing the anvil, or that he was art and part of stealing it; but only alledged that it was found in his smithy; into which, it being an open smithy, any person might have put it. 2^{dly}, The steward had committed iniquity, in refusing the defender an exculpatory proof. And, lastly, The fine was too high for the suspender's circumstances, so that it resolved into perpetual imprisonment.

Answered, The verdict of the jury cannot be reviewed.

Replied, The 48th act parl. 6. James III. allows the errors of affizers to be rectified by King and council; and as now we have no council, that power must be lodged in this court; and in many cases the Lords of Session give redress against iniquous verdicts in services, perambulations, &c.

The court suspended both verdict and sentence.

Adv. Fergusson.

Adv. P. Grant.

N^o 41.

June 1732.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

MATTHEW FOULDEN Merchant in Jedburgh.

*Rape.—Not a good defence, That the woman did not complain immediately.
—Offer to prove that she was still a virgin, disregarded.—Special verdict.—Arbitrary punishment.*

HE was indicted, March 28. 1732, for ravishing Agnes Donaldson, a girl about sixteen years of age; and it was particularly charged, That he violently threw her to the ground, notwithstanding her crying and resisting as much as she could, stopped her mouth, and threatened to cut her throat if she did not comply, and forcibly had carnal dealings with her; at least, that after she was on the ground, he discovered her nakedness, and that with his breeches down he was lying above her, and she crying, and in tears; aggravated by the heinous sin of adultery, he being married.

It was pleaded in defence for the pannel, That the girl had not recently complained, as the law required.

Answered, It was not necessary, by our present practice, that she should.

Further pleaded for the pannel, That she was still a virgin; which he offered to prove, and submitted the mode of proof to the court *.

Answered,

* A demand similar to this was made by Caroline de Grosberg, in the course of an action she brought before the court of session in 1765. The case was thus.

An advertisement having appeared in one of the London news-papers, bearing, That a Noble family in Scotland had occasion for a young woman, of good character, who was capable of teaching music, dancing, French, Italian, &c. Caroline de Grosberg offered herself to the person who had given this notice; and that person, without making sufficient inquiry about her, sent her down to this country.

Soon

Answered, 1st, Conatus, especially when devenit in actum proximum, is equally punishable with perpetration. *2dly,* The common distinction is just, between persons that did not because they could not, and those that did not though they could. The first are equally punishable with perpetrators; and therefore, though the pannel should prove the girl was still a virgin, by good witnesses, which would not

Soon after she entered upon her service, it appeared that she was incapable of the task she had undertaken; and it was discovered, from some letters that came to her, and other circumstances, that she had born at least one bastard child. For these reasons she was turned off; and upon that she brought an action of damages before the court of session, in which a proof was allowed.

Before the proof was concluded, and laid before the court, the pursuer gave in a petition, setting forth, That the defenders had endeavoured to prove, by several witnesses, some of whom were Jews, that she had born a bastard child: That she was conscious of her innocence, but unable to be at the expence of redarguing the depositions of these witnesses by contrary testimonies; but that there was a method of ascertaining the fact more certain than parole-evidence could be, viz. *inspectio ventris* by midwives or physicians, to which she was not only willing, but desirous to submit; and therefore praying the court to remit to proper persons to examine her, and report their judgement upon oath. — The court refused this petition *in hoc statu*, i. e. because they had not yet seen the proof.

After the proof was concluded, printed, and laid before the court, the pursuer preferred another petition to the same purpose with the former; and this petition the defenders were ordered to answer.

An answer was accordingly put in, bearing, That the petitioner's demand was unprecedented and most extraordinary; the rather, that she had already been examined by a surgeon, who told her, that though he would not take upon him to say whether she had brought forth a child before, yet he could assure her she was certainly with one at present: That the method of investigation proposed was not certain: That it was highly indecent; and on that account Justinian had forbidden it to be used as the criterion of puberty: That he had indeed allowed it to be practised in some weighty cases, in which it was necessary to know whether a woman was actually with child; but the law of no country had admitted it as a proper mode of determining whether a woman had ever brought forth a child: That she had, never will be presumed, but must be proved; and it easily may be so by unexceptionable evidence, without an immodest investigation: In this case it was sufficiently proved by witnesses that the petitioner had born two children.

The

not be an easy task in any case, that would not screen him, as it would only show, that he did not because he could not, considering the length he proceeded. 3dly, The law against ravishing women is not confined to virgins: a widow is as much protected as they; nor would it be a good defence to prove that a girl had made a slip before. Besides, a girl may not have the marks of virginity, and yet never have known man.

Replied, It is not law, that an attempt is equally punishable with perpetration; see *Mackenzie's Crim.* As to the third answer, the prosecutor mistakes the pannel's argument: what he contends is, that no person can have been ravished in whom marks of virginity remain.

June 16. 1732. The interlocutor on the relevancy was as follows.
 “ Find, That Matthew Foulden having, time and place libelled, com-
 “ mited a rape on Agnes Donaldson, by having, with force and violence,
 “ carnal dealings with her, relevant to infer the pains of death, and
 “ confiscation of moveables: *separatim*, find, That he, the pannel, ha-
 “ ving, time and place libelled, violently attacked the person of the said
 “ Agnes, by throwing her down, and discovered her nakedness,
 “ relevant to infer an arbitrary punishment; and repelled the hail
 “ defences proponed for the pannel; and remitted,” &c.

Several witnesses were examined on the part of the prosecutor, who deponed to the circumstances libelled, of her being lying on the ground, crying, and him above her, &c.; and she herself deponed, That when she cried out, he put his hand on her mouth, and two several times threatened to cut her throat if she continued.

The Lords delayed giving judgement on this petition till the whole cause should be advised.

Soon after, [Aug. 10. 1765.], upon advising the proof, and a hearing, the Lords refused the petition for the pursuer, assoilzied the defenders from the process, found the pursuer liable in expences, and superseded considering whether they would inflict any further censure on her, till 20th November next.— This last part of the interlocutor proceeded from her having been guilty of mal-practices in leading her evidence.

to oppose him : and she swore to the consummation of the rape in the most explicit terms, *Quod penetravit, et emisit.*

June 20. 1732. The jury, however, all in one voice, found it proved only, "time and place libelled, that the pannel, Matthew Foulden, was lying above the person of Agnes Donaldson upon the ground, with her nakedness discovered, mean while she was crying."

June 22. 1732. The court ordered him to be taken from the tolbooth of Edinburgh, and carried to that of Jedburgh, on the second Tuesday of July then next ; that then a paper should be put on his forehead, and he whipped through Jedburgh, and banished that town ; never to return, under the certification of being scourged if ever seen in it again.

Att. Jo. Forbes.

Alt. Hew Dalrymple, Ja. Graham.

N^o 42.

1733.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JOHN CHRISTIE.

Slaughter with a stone in a scuffle not capital.

THE interlocutor on the relevancy, Dec. 7. 1733, found, "the said John Christie pannel his having, time and place libelled, wounded or bruised the deceased George Crookbone with a stone, or other mortal weapon, upon the head, of which he died next day, or his being art and part thereof, relevant to infer the pains of law ; but allowed the pannel to adduce what proof he could for his exculpation or alleviation."

The jury found, Dec. 11. 1733, unanimously, "That at the time libelled, the deceased George Crookbone received a stroke on his head with a stone from the pannel John Christie, of which he died ;
and

and found it likewise proven, That the pannel was drunk, and was first attacked by Thomas Crookbone, brother to the defunct George Crookbone; in which scuffle the defunct engaging, received from the pannel the wound of which he died."

Dec. 14. 1733. The court banished him to the plantations for life.

Att. Duncan Forbes.

Alt. And. Macdoul.

N^o 43.

1735.

HIS MAJESTY'S ADVOCATE, and the Procurator-Fiscal of the High Court of Admiralty,

A G A I N S T

THOMAS MACADAM and JAMES LONG.

Homicide committed in execution of duty justifiable, though the slayer was in no danger of his life.—Sentence of the Admiralty, proceeding on the verdict of a jury, reversed.

THOMAS MACADAM, a private centinel, and James Long a corporal, were indicted at the instance of the public before the court of admiralty for murder; and the charge against them in substance was, That they, upon the high seas, off the shore of Nairn, on the 4th June 1735, killed Hugh Frazer younger of Belnain, by stabbing him with a bayonet in the breast, and afterwards throwing him into the sea.

The prisoners pleaded in defence, That they were, by military orders, appointed to attend the officers of the customs, in seizing goods by a law made seizable; and that they being in a boat upon the seas, along with the customhouse-officers, in quest of such goods, Frazer came up with them in another boat, with others in company with him; and leaping into the boat in which the prisoners and customhouse-officers were, endeavoured to take hold of their arms; and that this being both resistance to, and an attack upon the customhouse,

house-officers in execution of their duty, the homicide was justifiable.

It was answered, That Frazer's leaping into the boat was with no intention to make resistance, but to save his life, the pieces of the prisoners being aimed at him: That those in the customhouse-boat could have no just apprehensions of being mastered by Frazer, he having no invasive weapon about him, and being the only person who offered to get into the customhouse-boat, in which were several men well armed.

The judge, after hearing counsel, and advising informations, pronounced the following interlocutor. "*Sept. 25. 1735. Finds the libel, That the pannels, or either of them, did kill Hugh Frazer of Belnain younger, or that they, or either of them, were art and part of killing the said Hugh Frazer, relevant to infer the pains of death and confiscation of moveables; and sustains the defence of self-defence* proponed by the pannels, That the killing of the said Hugh Frazer by the pannels, or either of them, was in the *necessary defence* of their lives; and *repels the whole other defences* proponed for the pannels: and remits them, and either of them, with the libel and defence, and the several qualifications and circumstances of the defence, and the facts alledged on by the pursuers for eliding thereof, to the knowledge of an affize."

The jury returned the following verdict. "*Sept. 27. 1735. Unanimously find it proven, That the pannels, Thomas Macadam and James Long, are both guilty, art and part, of killing Hugh Frazer; and, by a plurality of voices, do not find the defence for the said pannels proven, That the killing of the said Hugh Frazer was in the necessary defence of their lives.*"

Sept. 30. 1735. The judge-admiral adjudged them to be hanged on the third Wednesday of November then next.

This trial was printed at Edinburgh in 1736; for which reason, the account here given of it is so succinct; but as the printed trial goes no further than the sentence of the Admiral, it is proper to in-

form, that the prisoners presented a bill of suspension of the sentence to the court of justiciary. The reasons of suspension were, 1st, That in this case there was no more, at the worst, than *homicidium in rixa commissum*, without any antecedent malice; and therefore the punishment should not be capital. 2^{dly}, They were allowed to prove nothing, but that the killing was in necessary defence of their lives; whereas this other defence ought to have been explicitly sustained, viz. That the boat in which they were was violently invaded, and they put in the utmost danger of being disarmed, and deprived of their liberty, which made it lawful to repel force by force, though it should terminate in the death of the assailant. 3^{dly}, By circumscribing their defence, the jury might believe a reasonable fear of their lives to be not within the interlocutor, and so they were deprived of what proof they might adduce of such fear. 4^{thly}, The sentence was the more unjust, that, by the military law, had they allowed themselves to be disarmed, but by a superior force, they were liable to the pains of death; and therefore the defence, That they were upon duty, ought to have been sustained.

The court, upon advising the bill of suspension, and extract of the proceedings before the Admiral, found, Dec. 5. 1735, “ That the
 “ said judge hath committed iniquity, in restricting the defences
 “ proponed for the suspenders to the necessary defence of their
 “ lives, and repelling the haill other defences proponed for them;
 “ and therefore did suspend the interlocutor on the relevancy,
 “ verdict returned by the assize, and sentence of death pronounced by the said judge, with all that has followed or may
 “ follow thereon, *simpliciter*; and discharge the magistrates of
 “ Edinburgh, and all other officers of the law, to put the said
 “ sentence of death in execution in all time coming.”

The ground of this judgement may be gathered from the informations in the noted case of Porteous; in which it was quoted for the prisoner. Mr Graham, afterwards Lord Easdale, who wrote the information for Porteous, speaks of it thus: “ The proceedings of the
 “ court of admiralty were laid before your Lordships for a review;
 “ which,

“ which, it is believed, is the single instance wherein it was ever
 “ contended, that the proceedings of the high court of admiralty,
 “ in matters criminal, could be reviewed by any other court.

“ Notwithstanding of which, your Lordships were pleased to re-
 “ verse the sentence of the Judge-admiral; no doubt, upon supposed
 “ error in his proceedings; because the verdict of a jury pronoun-
 “ ced upon evidence cannot be reversed *; and in consequence of
 “ which judgement of your Lordships, the pannels were set at li-
 “ berty.]

“ Now the pannel is advised, that such judgement in your Lord-
 “ ships could stand upon no foundation other than this, viz. That
 “ your Lordships had reversed the judgement of the Admiral as er-
 “ roneous, in not sustaining this defence to the pannels, That they
 “ were resisted by Mr Frazer deceased, while they, the pannels, were
 “ in the execution of their duty.”

Mr Forbes, (afterwards Lord President of the court of Session), who wrote the information against Porteous, expresses himself as follows with regard to this judgement: “ The procurator for the pannel en-
 “ deavoured to find an argument for him, in a late resolution of
 “ the court, which suspended a sentence of the court of admiralty,
 “ proceeding upon an interlocutor that found it necessary for soldiers,
 “ who happened to kill in the execution of their duty, when, by or-
 “ der, attending customhouse-officers, to prove, that the killing
 “ was necessary for the defence of their lives; inferring from this re-
 “ solution, that the court did not think it necessary for the pannel
 “ to prove, that he was in danger of his life: And though all that
 “ their observation necessarily implies were granted, they could have
 “ no benefit by it; because, in this case, the pannel neither does,
 “ nor can aver, that the firing which he was personally guilty of,
 “ and ordered, was necessary for securing the execution of that
 “ trust that was committed to him, or for preserving the rights of
 “ the crown, or any subject.

“ Where a man has, by law, weapons put in his hands, to be

* By statute 1475, c. 63.

“ employed, not only in defence of his life when attacked, but in
“ support of the execution of the laws, and in defence of the property of
“ the crown, or liberty of any subject, he doubtless may use those wea-
“ pons, not only when his own life is put so far in danger, that he can-
“ not probably escape without making use of them, but also when there is
“ imminent danger, that he may, by violence, be disabled to execute his
“ trust, without resorting to the use of those weapons; but when the
“ life of the officer is exposed to no danger, when his duty does not
“ necessarily call upon him, for the execution of his trust, or for the
“ preservation of the property of the crown, or the preservation of
“ the property or liberty of the subject, to make use of mortal wea-
“ pons, which may destroy his Majesty's subjects, especially num-
“ bers of them who may be innocent, it is impossible, from the re-
“ solution of the court of justiciary hinted at, to expect any counte-
“ nance to, or shelter for, the inhumane act.”

This was the first instance in which the judgement of the admiralty was reviewed by the justiciary. The then Admiral, Mr Graham senior, was very clearly of opinion, that the justiciary had no such power; and therefore, notwithstanding their suspension, he issued his orders to the magistrates of Edinburgh to put his sentence in execution. But they were not (it will be easily believed) obeyed.

Att. Hugh Forbes, Lockhart.

Alt. Hugh Dalrymple.

June 1737.

The KING against CALDWALL. —

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N^o 44.

June 13. 1737.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JOHN CALDWALL.

Madness tried without a jury.

HE was indicted for robbery.—Madness was pleaded in defence. — The court examined witnesses upon this point without sending it to a jury, and found this madness affected; and remitted him to a jury; which found him guilty, and he was condemned to death.

N^o 45.

June 1739.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

ROBERT THOMSON.

Murder.—Madness.

HE was indicted for murder, and madness was pleaded in defence.

The court found the libel relevant; but allowed the pannel to adduce what evidence he can, "That, at the time libelled, he was so far furious, mad, and distracted, as to be totally deprived of his reason and understanding; reserving the consideration, as to the import of which, as shall be found proven, until the verdict is returned."

The jury, in one voice, found the murder proved; and found no proof

proof of madness or furiosity in the pannel till after the murder was committed.

July 21. 1739. When the court was about to pronounce sentence, it was objected, That the forty days were elapsed since 11th June, when the trial began; therefore no sentence could now pass.

Ans. Excluding the 11th June, this is the fortieth day, and the days must be free days.

Memorials were ordered on this point; but judgement was prevented by a transportation-pardon.

Att. William Grant.

Alt. Lockhart.

N^o 46.

July 1739.

JOHN SANDERSON,

A G A I N S T

The Procurator-Fiscal of the Sheriff-court of PEEBLES.

Verdict voided, one of the jury having left the room after they were inclosed, and a sheriff-officer having had access to them.

HE was indicted for and convicted of theft before the sheriff of the county of Peebles; who thereupon banished him the shire.

He offered a suspension, upon this ground, That while the jury were inclosed, several persons were in the room with them, and had access to speak to them.

A proof was allowed to both parties; and upon advising it, the court found it proved, "That after the jury were inclosed, one of
" them came out of the room where they were inclosed, and conversed with some person; and that during the said time, one of
" the sheriff-officers entered the said room at different times; therefore found the verdict of the jury null, and sentence following
" thereon; and suspended the same *simpliciter*."

Compare the case of Barns in January 1704, and of Lyle in 1754, which are stated below in Ronald's case in 1763.

N^o 47.

June 1743.

The KING against PEACOCK.

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N^o 47.

June 13. 1743.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

ALEXANDER PEACOCK.

Competent for the Circuit-court to remit cases to the Justiciary, and vice versa.

HE was indicted before the circuit-court held at Glasgow 10th May 1743, for murder; and the jury brought in a special verdict.

The two judges present not being clear, certified the case to the court of justiciary.

After the remit from the circuit-court was read, the counsel for the pannel objected, 1st, That the remit was incompetent; for the act 1587, c. 82. restoring circuit-courts that had been long disused, implies, that the whole business was to be finished during the time of the ayr; and the circuit-court is quite distinct from the court of justiciary, as modelled by the act 1672; nay, the circuit in one town is different from that in another; and as the judges of two circuits could not meet and sit together, so neither can they meet upon the same cause in the court of justiciary.

Answered, The judges at circuits must have the power of remitting; else, in case of a circuit held by two judges, and their differing in opinion, a criminal might escape. The justiciary and the circuit are the same, though the quorum differs; and they have been in the constant practice of remitting to the justiciary; nay, the justiciary has remitted causes to them. Thus, in Sir Robert Monro's case, in 1722, they remitted to the circuit at Inverness; and they judged upon the informations given in at Edinburgh without any new debate, set a jury, received a verdict, and pronounced sentence. On the other hand, the circuit-court remitted to the court of justiciary in the case of Rose of Kilravock in 1709, and in the case of the magistrates

magistrates of Elgin in October same year, and in the case of Cockburn 1672, and in the case of Stewart same year.

The court unanimously found the remit competent, approved thereof, and passed sentence of death against Peacock, in respect of the verdict: which was read in court, but is not in the record.

N^o 48.

December 1743.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JAMES MACPHERSON.

Theft of two horses capitally punished.

HE was indicted for stealing two horses, and the jury found him guilty.

The question then came to be, What degree of punishment should be inflicted?

The Advocate insisted for a capital punishment; contending, That theft, and especially of cattle, or the *majora animalia*, is punishable with death by the law of Scotland. Small pickeries may not be so; but stealing all a man has, or horses or cows, which none but hardened offenders will do, is capital; and the theft even of a single horse or cow, is not simple theft, but *crimen abigeatus*.

Answered, By our law, a single act of theft is not punishable with death; *Mackenzie, tit. Theft, § 9.*: and here, though two horses (of small value) have been stolen, yet there was but one theft; *Voet. Comm. ad tit. De furtis, § 18.* Many offences are by statutes declared to be punishable as thefts, and yet it is not till the offence has been thrice committed that death is made the punishment; such as the hunting or fishing on other mens grounds, fishing in forbidden time, breaking dovecots, and many others.—A depredation by force is implied in the *crimen abigeatus, l. 1. § 1. ff. De abig.* A number
of

Aug. 1745.

The KING against DICKSON,

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of cafes were referred to, in which theft of cattle had not been capitally punished.

On the other hand, five cafes were referred to by the prosecutor, viz. that of Neilson in 1661, who was hanged for stealing one horse. But it was answered, He was a notorious thief. — Cafe of Murdoch in 1661, who was said to have been hanged for stealing seven cows. Answered, It is a mistake; he was only banished. — Three other cafes were quoted, in which a capital sentence had been pronounced for such offence. Answered, They were at circuits; at which the procedure is not so accurate, nor the indictments regularly ingrossed.

Feb. 27. 1744. The court condemned the pannel to death.

Act. Ro. Dundas.

Att. Geo. Brown.

N^o 49.

Aug. 4. 1744.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

THOMAS DICKSON, a servant.

Rape. — Arbitrary punishment consented to.

THE indictment charged, “ That upon the 30th April last, he
“ having met Elisabeth Hay, daughter of the deceased John
“ Hay of Candie, a young innocent girl, upon the high-road, near
“ her mother’s house, he seized her by the arm, and decoyed her a-
“ long the high-road, until they came to an old ruinous house at
“ the end of the village called *Cuffabouts*; and that he violently car-
“ ried her into the said ruinous house; and that while she was call-
“ ing for help, he violently threw her down upon her back, and
“ pulled up her cloaths, and stopped her mouth to prevent her cry-
“ ing; and having taken down his breeches, did violently tear a-
“ funder her legs; and in spite of all her resistance, did deflower

M

her:

“ her : At least, that, at the time and place libelled, he violently carried her into the said ruinous house ; and notwithstanding her cries and struggles, threw her down, and when she was on her back, pulled up her cloaths, and pulled her legs asunder, and having taken down his breeches, did all in his power to deflower her.”

It was pleaded in defence, That the indictment did not mention the parish, the county, nor the country, in which the crime was said to have been committed ; so that it did not appear the court had a jurisdiction : That deflowering was not a legal term, but a flower of rhetoric, which should not be admitted in a criminal indictment ; and might mean no more, than that he took a flower from her : That she had not complained recently, and no abduction was libelled ; and that if the rape was not completed, a capital punishment ought not to be inflicted.

Ans. No law requires, that the parish, or county, or country, should be mentioned ; and no reason why it should be required ; as in Scotland it is not necessary that crimes be tried in the county where they were committed, or by jurors of that county. — A crime of this nature might be tried by this court, though committed in another kingdom. But no occasion to maintain this, as the libel is proper. *Mack. tit. Crim. libel*, § 1. says, the libel should mention “ the place where the crime was committed, either expressly, as the house of such a man, or *per coherentias*, as lawyers speak ; as, that it was done near such a hill, water,” &c.—Not necessary to use technical terms ; but deflowering is a technical term ; see *Mack. tit. Ravishing*, § 2. 4. — The King may prosecute, though the woman should not complain recently, or not at all ; *Nullum tempus occurrit Domino Regi* : and by later practice, a recent complaint not requisite. In fact, she did complain in a day or two. It is not necessary that abduction be libelled. The degree of punishment will be considered when the verdict is returned.

The court ordered informations.

The

Feb. 1745.

CROSS, &c. against RAE.

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The pannel offered to transport himself to the plantations for seven years, rather than risk the trial; and the Advocate insisting for no more, he was banished accordingly.

Adv. Advocatus Craigie; Solicitors Dundas, Pat. Haldane.
Ja. Graham, Williamfon, Al. Home, J. Gillon.

Alt. W. Grant,

N^o 50.

February 1745.

JOHN CROSS, with concurrence of his Majesty's Advocate,

A G A I N S T

JOHN RAE.

A prosecution for mutilation may be insisted in before expiry of year and day after the fact.—Special verdict.—Damages and expences awarded.

THE charge in this case was, "That the pannel having got the
" thumb of the complainer's right hand into his mouth, by
" biting and gnawing of it cut the arteries and bruised the bone,
" so that part of it did separate from the other, whereby the com-
" plainer is evidently mutilated of the thumb of his right hand,
" which to him is a great loss, as he is thereby rendered incapable
" of writing; and thereafter the pannel having thrown the com-
" plainer to the ground, did draw the complainer's left hand to-
" wards his mouth, and bit him through the fleshy part thereof, to
" the effusion of his blood."

The defender, in point of fact, represented, That in a drunken scuffle, in which the complainer was the aggressor, he thrust his thumb into the defender's mouth, and was endeavouring to tear the defender's cheek, and push him over the stair, by the command that hold gave him, when his thumb was bit.

In point of law the defender argued, That the essence of the libel consisted in the alledged mutilation of the complainer's thumb, without which it would have been below the notice of the high court of justiciary; and if the mutilation fixes the competency, the

rules of court, in cognoscing such crimes, will no doubt be observed. Now there is no rule more distinctly laid down, and better supported with reason and authorities, than this, That the crime of mutilation cannot be prosecuted till year and day from the commission of it. This is expressly laid down by Lord Pitmeden, in his treatise of Mutilation and Demembration, part 1. § 1.; and the reason he assigns is, "Because, by our custom, so much time is allowed to expect recovery:" and so it was determined, 17th December 1624, *Boyne contra Haitly*, and 10th January 1640, *Ker contra Haliburton and Cramond*.

Answered for the prosecutor, 1st, In our law no distinction is made betwixt mutilation and demembration; the crime is considered to be the same in both cases, and the same punishment is fixed for both. This appears from act 28. parl. 1491, and act 118. parl. 1540, and act 76. parl. 1579. These acts put mutilation and demembration upon the same footing with manslaughter, injoining the officers of the law to seize and apprehend the criminals, and bring them to justice without delay; consequently mutilation and demembration, as well as manslaughter, may be pursued *de recenti*, without any delay further than the common *inducie*.

2^{dly}, No good reason can be assigned for the delay of year and day; at least that assigned by Pitmeden is insufficient. It is true, if the process be brought *de recenti*, when it is uncertain whether the use of the member mutilated may be recovered, the estimation of the damages cannot be so precise as after that matter is ascertained by time. But whatever influence that consideration may have as to the *quantum* of the damages, it ought not to afford a total defence. If the prosecutor be willing to accept of such damages as the court will give him, weighing all hazards, there is no reason for putting off his cause a week. In this case the prosecutor is willing to accept of such damages as shall be thought proper, after inspection of the part mutilated; the use of which is entirely lost, the tendons being cut through and shattered, as well as the bones crushed.

3^{dly}, The decisions quoted for the defender do not apply. In the
case

case of Boyne, the libel was for mutilating and dismembering the first and second fingers of the complainer's left hand; the defender pleaded, No process till expiry of year and day; the complainer passed from the mutilation, and insisted on the demembration of his two fingers; which was found relevant, and remitted to the jury. Here the complainers, in reality, passed only from a *word*, not from any circumstance of the crime; and at any rate this was the concession of the pursuer. In Ker's case, the crime libelled was mutilating the complainer's right hand; the court, in respect of the recency of the crime, continued the diet to a certain distant day. A right hand is a valuable member, and the cure might have been so uncertain as to be a reasonable motive in that case for suspending the trial; but this is no precedent for establishing, that in *no case* of mutilation can a trial proceed till after year and day. In the present case it is but too certain the prosecutor will never recover the use of his thumb in any degree. There have been many cases since Ker's, brought before the court recently after the fact, and none of them were put off till year and day, and in most of them the defence was not so much as pleaded. It was in the case of Andrew Johnston *contra* Francis Charteris, 18th November 1706, but it was among others over-ruled by the court.

4thly, The libel in question is not barely for mutilation, but for invading, beating, and wounding; so that here there is a complication of crimes.

Replied for the defender, to answer *1st*, The acts cited do not touch the question: The first relates to demembration upon forethought felony; the other acts do not specify the punishment of the crime, but only the mode of proceeding for bringing the offenders to justice. Demembration and mutilation are distinct in their own nature: when a member is cut off, and the wound healed, it would be absurd to wait for a time, to see whether it would unite again to the body. The damage sustained from the want of it can be as well known at the time of the prosecution, however recently brought,

brought, as at the distance of years ; but that will not hold in mutilation.

To the 2^d, Wounds and contusions may at first appear frightful, which, through time, and by the application of proper remedies, come to nothing ; and physicians will inform the court, that in a distemper incident to the thumb, vulgarly called *the whittle*, that member will be inflamed to a great degree, then turn purulent, and affect the bone of the first article so as to occasion it to separate from that of the second, yet in time a callosity shoots out, which answers all the uses of the bone of the first article ; and this commonly happens when splinters and pieces of the bone in the thumb, or any other part of the body, are detached from it. It is true this is the work of time ; but that is the very reason, why, in cases of mutilation, trial is delayed till year and day after the fact.

To the 3^d, In Boyne's case, it is plain, from the pursuer passing from the mutilation, that he understood, and in effect admitted, the defence to be well founded. In Ker's case, which came on in January 1740, the interlocutor was in these words : " In respect the
" crime libelled was done in October last, which is not above three
" months as yet, the Lords continue the diet to the last Wednesday
" of November next."

If the prosecutor could have mentioned any cases in which the libel was singly for mutilation upon a battery, and brought within year and day, these might have applied ; but the cases which he refers to were brought after year and day ; so that there was no room for the defence ; they were brought too for dememoration, against which it is not competent. In the case in 1706, a multiplicity of offences were libelled ; such as, that the defender beat the complainer with a cane, ordered a wheel to be taken off his cart in time of harvest, and his looms or instruments, by which he gained his bread, to be taken out of his work-house, and that the complainer had lost his nose in the scuffle. The libel was complexly sustained, and a special verdict returned on all the particulars ; and the defender was found liable in L. 500 Scots, whereof ten merks to the fiscal, and

Feb. 1745.

CROSS, &c. against RAE.

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and the rest in full, for expence of cure, damages, and costs. The libel, so far as it respected the complainer's nose, was laid rather for demembration than mutilation, and on that account the dilatory defence was but faintly insisted on.

To the 4th, If the complainer will pass from his libel as to the mutilation, the defender is willing to go to trial as to the other facts, if the court shall think they merit its cognifance.

After hearing counsel, the court ordered informations, of which the above is a summary. Upon advising them, Feb. 25. 1745, the court found the libel relevant to infer the pains of law, damages, and expences; and allowed the pannel a proof of all facts, &c.

March 1. 1745. The jury brought in a long special verdict, finding it proved, That at the time libelled the pannel gave the prosecutor a blow without any provocation, and then another: That a scuffle ensued, in which the pannel severely bit the prosecutor's thumb and the fleshy part of his hand: That the bones of his thumb were crushed; that he suffered great pain, and for ten days it was thought he would lose the use of his thumb altogether: That the cure is not now perfected, though they hoped he may recover the use of his thumb for most purposes: That the pannel had no previous ill-will to the prosecutor, and that he was very much the worse of liquor all along.

March 2. 1745. The court decreed the pannel to pay to the prosecutor L. 200 Sterling, for damages and expences.

Att. Hen. Home.

Alt. Ja. Graham,

N^o 51.

N^o 51.

June 1746.

JOHN SIVRIGHT of Southouse, with concurrence of his Majesty's Advocate,

A G A I N S T

Mr ALEXANDER LOCKHART, Advocate.

Battery.—May a verbal injury be retorted by a real one ex intervallo?

—Pannel allowed to prove provocation given several days before the scuffle.—His daughter admitted as a witness.—Verdict absolving the pannel, and recommending to the court to award him his costs.

MR Lockhart was charged with having committed an atrocious battery, on the person of Mr Sivright, on the 6th May 1745, aggravated by his being a lawyer, skilled and versant in the laws of his country; and the conclusions were for L. 500 of damages, and L. 100 of fine.

It was set forth in defence, That the prosecutor had conceived a causeless ill-will to the pannel, on account of his having purchased a farm from Mr Sivright, who had often declared, before the time libelled, that he would stay in the neighbourhood on purpose to pick a quarrel with the pannel, and be a thorn in his side: That he had on several occasions bestowed the most abusive and provoking language on the pannel, his family and relations; and particularly, on the 4th of May, when he met him in a carriage with his lady, accompanied by his daughter on horseback; and it was insisted, that he should not only be allowed to prove the provocation he had on the day libelled, but that which was antecedent.

It was objected for the prosecutor, in point of law, denying the provocation alledged, that a verbal injury cannot justifiably be *retorted* by a real one, especially *ex intervallo*. For proof of which position Farinacius, Gail, Berlichius, Carpsovius, and others, were referred to.

Answered,

Answered, Whatever phlegmatic commentators hold, it may, as some verbal injuries are more atrocious and provoking than a blow; and in this case the pannel himself, and his family and relations, were abused in the grossest manner. He cannot be said to retort *ex intervallo*, who retorts as soon as an opportunity offers. Berlichius is express on this: "Incontinenti retortio fieri debet; et tunc, licet ex intervallo fiat in eo tempore interponatur, quo quis retorquendi habuit potestatem;" which was this pannel's case: he could not retort on the 4th May, from tenderness to his lady, who was with him, and he did not see the prosecutor till the 6th. But further, though the drubbing had been at the distance of months, that can afford the private prosecutor no argument. It may be an offence punishable at the instance of the public: but if it be a consequence of the first injury, so as to be reckoned *retortio*, with regard to the private party it is no matter at what distance of time it be; he cannot claim damages for suffering what his own intolerable behaviour brought upon him.

The court, upon informations, found the libel relevant; and allowed the pannel to prove all facts and circumstances that happened on the day libelled, that tended to exculpate or alleviate; and further the antecedent provocation.

Several witnesses were examined for the prosecutor; only two for the pannel; one gentleman to prove, that Mr Sivright had, a considerable time before the scuffle, sent an abusive message by him to the pannel; the other was his daughter, to prove what passed on the 4th May. It does not appear from the record, that any objection was stated against the admissibility of this witness.

June 24. 1746. The jury found the pannel not guilty; and recommended to the court to consider what reparation was due to him for the injurious treatment he had received.

Upon this he was absolved; but a petition he gave in for costs. was refused.

Adv. Haldane, et alii.

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Adv. Hen. Home, et alii.

Nº 52.

N^o 52.

March 3. 1747.

His MAJESTY'S ADVOCATE,

A G A I N S T

PATRICK WALLACE and ROBERT FERRES, two soldiers.

Rape capitally punished.

They were indicted for a barbarous rape, committed upon Helen Low; and it was particularly charged, That they violently threw her down on the ground, and one held her, while the other attempted to ravish her: That she resisting with all her might, they beat her on the head unmercifully; and her strength failing, they had carnal knowledge of her, the one after the other.

The libel was found relevant, and a proof allowed them of all facts and circumstances, &c.

The jury, by a plurality of voices, found the indictment proved. Upon which, March 3. 1747, they were both sentenced to be hanged: and one of them was executed; the other got a remission.

N^o 53.

July 3. 1747.

His MAJESTY'S ADVOCATE,

A G A I N S T

ROBERT SPENCE.

Murder.—Madness.

HE was indicted for, and found guilty of the murder of Katharine Walker, in a barbarous manner. The jury found it proved, That he committed the murder, and also that he was furious at the time it was committed.

The

July 1748.

The KING against BURTON.

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The court adjudged him to be imprisoned during life; and ordered the magistrates to deliver over his person to such friend as shall find sufficient caution acted in the books of adjournal, to the Lords satisfaction, to confine him in sure and safe custody, during all the days of his life, under such penalty as they should direct; and in the mean time ordered the magistrates of Edinburgh to receive and detain him prisoner, as they will be answerable on their highest peril.

In the similar case of James Somerville, in 1704, he was not condemned to death, in respect his madness was proved; but he was fined in 300 merks to the relict and children of James Ferguson, whom he had killed, and ten merks to the fisk, and ordered to be imprisoned in the correction-house of Edinburgh, and not to be liberated therefrom until a certificate be granted, under the hand of the magistrates, and two knowing physicians, that he has recovered, and become sound in his judgement; and the same, with the discharge of the fine, to be presented to the Lords.

N^o 54.

July 1748.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

Serjeant SAMUEL BURTON.

Murder.—Self-defence.—Execution of duty.

HE was indicted for the murder of James Aiken, on the 13th April, in the town of Lanerk.

The defence was, That when he was recruiting in Lanerk, one of the townsmen quarrelled with him, and the bailie having found the townsman to be in the wrong, granted warrant to put him in prison; but the mob endeavoured to rescue him. The pannel, and

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two

two or three soldiers, were ordered by the magistrate to assist the town-officers in putting the warrant in execution: but the mob attacked the soldiers, pelted them with stones, and having got upon the stair of the prison, threw one of the soldiers over it, and trampled upon him to the danger of his life. The soldiers several times brandished their swords, and made passes, yet so as not to hurt any person; but at last, by the pressure of the croud, Aiken was unluckily thrust upon the serjeant's sword; so that the slaughter was accidental: but though it had been intentional, it was justifiable, being in self-defence, and in execution of duty.

Ans. There was a tumult at the time libelled, but it did not go so far as to justify the killing Aiken.

July 11. 1748. The verdict of the jury was as follows. "They all in one voice find the libel proven; also find it proven, by a plurality of voices, that what the pannel did or committed, was in self-defence, and in the execution of his office." Upon this he was dismissed from the bar.

Act. W. Grant, et alii.

Alt. Macqueen, et alii.

N^o 55.

December 1749.

HIS MAJESTY'S ADVOCATE,

AGAINST

ALEXANDER LIVINGSTON.

Murder.—Arbitrary punishment inflicted on a pupil capax doli.

AT the circuit-court held by Lord Elchies, at Stirling, in September 1749, Alexander Livingston, a boy under fourteen years of age, was indicted for the murder of Alexander Henderson, on the street of Falkirk, on the 12th day of August preceding, by stabbing him with a penknife: and it is further charged, that Livingston had

had threatened the deceased with harm or mischief on the day libelled; and that being challenged for what he had done, immediately after the fact, he said, "If any body would do so and so to him, he would do as much to them;" and that he having, at this time, his hand below the haunch of his coat, upon examination by persons present, the naked knife was found still in it. At least art and part, &c.

The interlocutor pronounced on the relevancy was as follows. "Finds that the pannel having, time and place libelled, killed and murdered the deceased Alexander Henderson, or his being art and part thereof, relevant to infer the pains of law; but allows the pannel to prove his age, and that he was not *doli capax*, and all other circumstances he can prove, either to elide the crime, or alleviate the punishment."

The verdict returned by the jury was as follows. "Find, by a plurality of voices, it proven, That, the time and place libelled, the pannel threatened harm to the deceased Alexander Henderson, son to George Henderson carter in Falkirk; and that the said Alexander Henderson was stabbed or wounded in his left side, of which he died: but find it not proven that the pannel was the person who stabbed or wounded him: and further find it proven, That the pannel, at the time and place libelled, was seen with the aforesaid Alexander Henderson, having a sharp-pointed unfolded penknife in his hand: and also find it proven, That the pannel was twelve years of age in the month of March last, and that he is *doli capax*."

Lord Elchies, in respect of this verdict, and of the difficulties that occurred in the case, remitted the same, and the pronouncing judgement thereupon, to the high court of justiciary at Edinburgh; and ordered the prisoner to be transported thither.

The court of justiciary assigned the prisoner counsel: who, as well as those for the King, having been heard on the import of the verdict, memorials were ordered.

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The memorial for the crown argued as follows.

"The counsel for the prisoner was pleased to insist, That the proper sentence to be pronounced on this verdict, was for the court to assilzie the prisoner, or dismiss him *simpliciter* from the bar, by reason of that clause in the verdict, "finding it not proven that the pannel was the person who stabbed or wounded the defunct."

On the other hand, it was, for the pursuer, observed to the court, That the import of this verdict pleaded by the prisoner's counsel, could not possibly be the true intent and meaning of the jury themselves: That the sentence must no doubt be regulated by the verdict, or founded upon it; and if the verdict be general, or clearly decisive of the cause, as when the jury pronounce the pannel guilty, or not guilty, or that the crime libelled against him is proven, or not proven, and no more, there is then nothing left to the deliberation of the court, it being obvious and certain what the judgement must be.

But it is otherwise in the case of a special verdict, when the jury think fit to wave, as they may do, the giving a total or final decision as to the guilt or innocence of the pannel; and, without drawing any conclusion, report the special matter as it appears to them, and so leave or refer the conclusion to the judgement of the court.

In such case, the court is necessarily called upon to consider the true import and meaning of the verdict, from the nature of the case, and the whole words and parts of that verdict; in like manner as a jury must consider, the best they are able, the import and meaning of an interlocutor, remitting the libel and defences to their cognisance.

In this verdict, it is impossible that the jury could intend, by the clause founded on for the prisoner, that he should be *simpliciter* acquitted of the crime with which he is charged; 1st, Because such a verdict would have been very unjust in itself, and contrary to the evidence, which is not easily to be presumed. 2^{dly}, In fact this verdict, nor no part of it, draws any such conclusion, nor does pronounce the pannel not guilty of the murder libelled; or that the
fame,

fame, or his being art and part thereof, is not proven against him. 3dly, It is impossible that they could so mean or intend, by reason of the other articles or clauses preceding and subsequent in this special verdict: in which they first of all find it proven, that, the time and place libelled, the pannel threatened harm to the defunct; and, 2dly, That the defunct was stabbed or wounded in his left side, of which he died; and, 3dly, after the intermediate clause which is objected, they find it proven, That the pannel, at the time and place libelled, was seen with the defunct, having a sharp-pointed unfolded penknife in his hand; and, 4thly and lastly, find it proven, That the pannel was twelve years of age in the month of March last, and that he is *doli capax*.

To what intent and purpose could all this enumeration of circumstances be made that are found proven against the pannel, but to leave or refer the import of these to the judgement of the court? which is a demonstration, that, by the middle intermediate clause, they were far from intending to pronounce such a verdict as that the pannel must be *simpliciter* affoizied; and when the whole is taken together, which is the fair and just method of interpretation of verdicts, as well as laws and all other writings, the meaning of that middle clause in this verdict can be no other, than that there was no direct proof of the *ictus*, or act of stabbing itself; which, *inter alia*, is in the libel affirmed.

This is therefore truly a special verdict: and in such case, though the pursuer would be far from pleading, or insisting, that the court in any case may, or ought to incroach upon the province of the jury, by considering the proof, in order to judge of it differently or contrarily from what the jury has done; yet when the jury themselves, by a special verdict, remit or refer, as they may do, their province back to the court, he apprehends it is competent and necessary for the court itself to look into the proof, for the better understanding of the true import of the particulars specified shortly in the verdict. This is the natural consequence of the court being put in place of the jury, in order to form the final judgement, or draw the

the conclusion from the evidence, which they have not done; and this could not be avoided in ordinary cases, where the judges who have taken the trial, and examined the witnesses, already know, and are possessed of, the evidence, as well as the jury; and it is necessary for the court to do the part remitted to them, though they should resolve to confine themselves to the heads or special articles summarily mentioned in the special verdict.

For example, in the present case, the first point is, That the pannel threatened harm to the defunct. Why may not the court look into the evidence, to see whether that is proved to have been done which the jury mean? Again, they find proven, That, the time and place libelled, the pannel was seen with the defunct, having a sharp-pointed unfolded penknife in his hand. Now, as to this circumstance, of being seen with the defunct at the time the thing happened, that is of more or less weight, according as the pannel was the sole person near him; or if they were both in a croud: how then was it possible for the judge who tried the cause, had he proceeded to advise this special verdict, to forget what is in proof, that the pannel was the sole person near the defunct, and that the pannel, being allowed a proof of all facts and circumstances to elide or alleviate, had brought no proof of any croud, or of any other person, with or without a penknife, close by the defunct at that instant?

Again, when it is found proved, That the defunct was stabbed or wounded in his left side, of which he died, and that the pannel was then seen with him, having a sharp-pointed unfolded penknife in his hand, it might have been material for the pannel himself, that the court, in advising this special verdict, should look into the proof, if it had so happened, that the mortal wound was proved to be of such a nature or size, as could not have been inflicted with the small weapon that was seen in the pannel's hand at the time; for in that case, though both the facts reported be true, this circumstance would have afforded an objection against conjoining them as evidence for convicting the pannel.

This is not urged by the pursuer, as if it were absolutely necessary in

in the present case, but because he apprehends it to be truly competent for the court, and in many cases necessary for justice on either side, that, in advising a special verdict, the court cannot shut its eyes to the evidence which the jury refers to them to judge upon, at least in so far as concerns the heads or articles in the special verdict mentioned: and at the same time, in the present case, if the court were to confine itself to the four articles above recited, found against the pannel, the pursuer apprehends they can have no doubt, that the pannel was guilty, or art and part of the murder; for in this view, it must be taken along, that the verdict finds nothing of any other person being near the defunct, or seen with him, or had then threatened harm to him, or was found with an unfolded pen-knife, and heard to justify the action, and all *ex incontinenti*. In short, no doubt can remain, from the very circumstances found in the verdict, that the prisoner was the author of the defunct's death; and as the jury have explicitly given their judgement, that he is *doli capax*, as well as that he was then near twelve and a half years old, that he was guilty of the murder.

This verdict indeed greatly resembles that in the case of the Master of Burleigh, Aug. 4. 1709, [See N^o 20.], where the jury found it proven, That the pannel discharged a pistol against the defunct; as also, That the defunct was wounded in two places, and that he died within twelve days after he was wounded: but found it not proven, That the said wounds were given by the shot of the pistol discharged by the said pannel. But notwithstanding this absurd adjection, the court, in respect of what was found proven, adjudged the pannel to suffer the ordinary pains of law for murder.

‘If therefore this be truly a special verdict, and that the articles found by the jury, and left to the consideration of the court, do convincingly infer the guilt of the prisoner; it is a clear consequence negatively, that justice, and the course of the law, cannot permit, that the prisoner should be *simpliciter* affoizied or dismissed: and the only question that remains is, Whether the ordinary and capital punishment,

nishment, or an arbitrary punishment only, should be inflicted on him ?

The pursuer at the hearing was willing to submit that to the judgement of the court; not thereby intending to take upon him arbitrarily to restrict to a punishment which the law has clearly and certainly made capital, which no doubt belongs to the prerogative of the crown; but as the criminal law of this country consists partly of the Civil law, and those of other well-governed nations, to all which our libels and our debates refer, in cases of crimes against common humanity, where we have no statute or fixed custom determining the punishment; and as this of the punishment of pupils is a point which the doctors treat problematically and variously, the pursuer was willing, as he still is, to submit it to the judgement of the court what they may and ought to do in the present case, and shall proceed to lay before the court for their consideration, some of the most approved authorities upon the question.

It is treated by Sir George Mackenzie, *tit.* 1. § 5. somewhat loosely, as if the question were upon minors in general.

In the Civil law, one of the most explicit texts upon this question is the *l.* 111. *De reg. juris*; "Pupillum, qui proximus pubertati sit, capacem esse et furandi et injuriæ faciendæ."

l. 7. *Codicis, De pænis*; "Impunitas delicti propter ætatem non datur, si modo in ea quis sit, in quam crimen, quod intenditur, cadere potest."

l. 14. *De senatusconsulto Silaniano*; "Excipiuntur impuberes fervi. Trebius autem Germanus legatus etiam de impuberi sumi jussit supplicium: et tamen non sine ratione. Nam is puer nec multum a puberi ætate aberat, et ad pedes domini cubuerat, cum occideretur, nec postea cadem ejus prodiderat: et his duntaxat impuberibus senatusconsulto parci credebat, qui tantum sub eodem tecto fuissent; qui vero ministri vel participes cædis fuissent, et ejus ætatis (quamquam nondum puberes) ut rei intellectum capere possent, his non magis in cæde domini, quam in ulla alia causa, parci oportere."

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It must be allowed, however, to be true, that several of the doctors, who have been often quoted in this court, lay down as a principle, That it is in the power of the court to restrict or mitigate the punishment of a criminal under age. Thus in *Sande's Decisiones Frisicæ*, b. 5. t. 9. defin. 4. the summary is in these words: "In arbitrio judicis positum est, an minor viginti quinque annis, propter homicidium, vel aliud capitale crimen, commissum, ordinaria vel extraordinaria pœna sit afficiendus." And in the title he says, "Quamvis autem minor ætas non prorsus a pœna excuset, recepta tamen opinio est, pœnam esse minuendam, ut tradunt Julius Clarus, Antonius Gomesius, Jacobus Menochius, &c. — Sed an judex, ob minorem ætatem, necessario cogatur pœnam mitigare, non modica disceptatio est: alii enim id judicis arbitrio relinquendum censent, ut Menochius, Fachineus, et Mornacius; alii id juris necessitati subiectum affirmant, ut Gomesius, Cessaurus, Folerius. Hæc posterior sententia, quamvis benignior videre posset, prior tamen de jure verior est, per l. 37. De minoribus; Minor non meretur in integrum restitutionem, nisi quatenus interdum miseratio ætatis ad mediocrem pœnam judicem perduxerit." Then the author adds to his own opinion the practice of the court of Friesland, in these words: "Relinquitur ergo arbitrio judicis habere rationem ætatis, qui pro varietate circumstantiarum, vel ordinariam vel extraordinariam, vel minorem vel graviolem pœnam infligere debet; et hoc observat senatus noster." And he gives examples of both kinds.

Julius Clarus, who was judge of the court of Milan, l. 5. quest. 60. § 3. says, perhaps a little too strongly and generally, "Sed in omnem casum nunquam debet pupillus pœna capitali affici, pro quocunque gravi delicto, sed ejus pœna debet esse citra mortem vel membri mutilationem."

Carpzovius, a judge of the court of Saxony, part 3. quest. 143. N^o 61. and downwards, treats this question of the punishment of minor criminals, and denies the opinion of those who hold that the capital punishment cannot lawfully be inflicted; and in answer to

the objection, says, "Quod enim dicitur, et ex textibus allegatis probatur, ætatem veniam mereri, id certo certius est; sed in ætate impubere tantummodo obtinet, ad minoritatem vero haudquam extendi debet, eo quod minores regulariter dolo ac malitia delinquent." And afterwards he lays it down, that even in the case of minors, a mitigation of the ordinary punishment may be made from circumstances; and says it is so practised in the court of Saxony.

It was on account of these, and the like authorities of the authors and decisions that are frequently quoted in this court, that the pursuer was willing to submit it to the judgement of the court, what should be the degree of the punishment inflicted in the present case, the terms of the verdict, as well as all other circumstances, considered; though he insisted, as he must still do, that the verdict is special, and leaves room for the court to inflict a punishment; which, if it may be done, justice requires that it be done.

As to the question, Whether it be in the power of the court to inflict any punishment less than the capital punishment, or proper punishment for the crime of which the prisoner, upon trial, has appeared to be guilty? it depends upon this, whether the court may not, as often has been done, regulate its decisions by such authorities and examples as those above mentioned, of the courts upon the continent, that follow, in great measure, as we do, the Civil law: And this the pursuer did, and still does, submit to the court, without chusing to insist for the capital punishment or nothing; which, though he conceives it might be legally inflicted against a boy of twelve years and a half, that is found to be *doli capax*, he is willing to submit to the court whether that must necessarily be done. And indeed the chief circumstance that determines the pursuer, in the present case, for the sake of public justice, not to insist with the utmost competent rigour for the capital punishment, is the unskilfulness appearing in that part of the verdict which is objected, and which alone creates any doubt or difficulty: and in such case, it is not the pursuer's inclination, or, in his apprehension, his duty, to
press

press for the capital punishment, where there is even any shadow of doubt, whether it can be competently inflicted; though he insists, that there is no doubt, that the jury have left, and even made room, and so made it necessary, for the court to inflict some punishment.

It is true, that by the law of England, in such case, according to the excellent Lord Hale, part 1. chap. 3. fol. 26. "An infant, past twelve years of age, appearing to be *doli capax*, and convicted of a capital offence, must receive judgement of death; though, according to the nature of the offence, and circumstances of the case, the judge may or may not, in discretion, reprieve him, in order to the obtaining the King's pardon." And in that chapter, this whole doctrine of the punishment of infants is treated by the learned author with more distinctness and precision, than by any of the writers above quoted. But still the question before mentioned remains to be judged by the court, Whether they are in like manner tied up to pronounce the capital sentence or none? or if, upon this verdict, your Lordships may not competently inflict a suitable arbitrary punishment? The pursuer insists only for the sake of public justice, that either that may be done, or otherwise the capital sentence be pronounced, with such respite of execution, and after representation of the case, as to the wisdom of the court shall seem fit."

The memorial for the prisoner argues as follows.

"The counsel for the pannel must observe, in the *first* place, That the verdict does not at all apply to the interlocutor upon the relevancy; and therefore that no conclusion can be drawn against the pannel. The pannel's killing and murdering the defunct, or that he was art or part of the murder, are found relevant to infer the pains of law; and the indictment, so found relevant, is remitted to the verdict of an assize. It was the duty of the assize, in pursuance of this interlocutor, to apply their verdict to it, by finding the pannel guilty of the murder, or was art and part thereof; or that he was not guilty either of the murder, or of being art and part. They found

found the murder not proved against him; and so there is an end of that alternative: Neither have they found it proved, that he was art and part; and so there should be an end also of that other alternative.

But here it was urged, That though art and part was not found proved in so many words, yet that certain circumstances are condescended on as proved, which infer art and part; and which the jury were willing to leave with the court, in order to judge whether art and part was to be inferred from them yea or not.

In answer to this, it is not said, and it must not be presumed, that it was the intention of the jury to leave this matter to the court: it is more likely, that finding certain facts proved, they took them into the verdict, without taking upon them to consider what effect such a verdict ought to have in law. The interlocutor upon the relevancy, which was their text, is plain and perspicuous. Had the jury been of opinion, that the facts condescended on in the verdict did infer art and part, they would have found so, as directed by the interlocutor: and since they have not found so, the pannel must be acquit, in consequence of the interlocutor. It must not be assumed, that the jury, doubtful whether the above facts would infer art and part, intended to leave that point to the judgement of the court. If they have not said so, it must be inferred that they did not mean so; for, as it is well expressed in the English law-books, "When a verdict is found, there can be nothing added to it, or taken from it; but as it is found, so the court must judge of it: and whatever is found in a verdict, whereupon the court can give any judgement, must be positively found, and not ambiguously; for if the jury doubt, the court can never resolve the matter of fact*." In a word, the verdict remits nothing back to the court; it must be taken as it stands: and since neither of the points contained in the interlocutor are found proved, the pannel falls to be affoizied.

The counsel for the pannel humbly offer a second point to the

* Trials per pais, 287.

consideration of the court. They conceive it to be the province of the jury to determine every thing in point of fact; they must either find the facts, found relevant by the interlocutor, to be proved, or not proved: they have no power to remit the cognition of these facts to the court; and therefore, though the verdict had contained an express remit, the legality of it is much doubted; for at this rate, a jury may devolve the whole of their duty upon the court, and thereby impower the court to judge of the facts as well as of the law. This would be against the common law of the land, which bestows upon every man that invaluable privilege of being tried by his peers. It will occur, with regard to the present case, that the supposed remit here is not to try whether facts are proved or not proved; that the facts are ascertained by the verdict; and the remit is only to the Lords to judge, whether these facts amount to art and part, yea or not. But this implies a distinction which is more plausible than solid. For, by the same rule, there is scarce any fact, however simple, but may be brought under such a remit. There is no doubt a great deal of law, and a great deal of knowledge, required in judging of parole evidence. The credibility of the facts, the characters of the witnesses, the *causa scientie*, the prepollency of contradictory evidence, and many other circumstances enter into it. If a jury, upon pretext of dubiety, may remit to the court to consider whether certain facts do or do not infer art and part, they may, upon the same pretext, remit to the court to judge whether such and such particular facts are proved or not proved, setting forth at the same time the evidence *pro* and *con*, or shortly referring to the proof. At this rate there is no fact but which may be subjected to such a remit; and so the law is at an end intitling every man to be judged by his peers.

But, 3^{tho}, It could not be the intention of the jury to remit the facts in the verdict, in order to a judgement, whether they do or do not infer art and part. The jury knew, and every person concerned in the trial knew, that no other person was libelled as the murderer, and indeed that no other person but the pannel was suspected

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to be the murderer ; the jury therefore, in this case, could have no notion of finding the pannel art and part in this murder, when there was no principal actor, no other person guilty with whom the pannel was accessary, or art and part. The pannel must have been the murderer, if any thing at all was to be laid to his charge ; and since it is found not proved that he was guilty of the murder, there is an end of the question ; he cannot be found guilty upon this verdict.

And, in the last place upon this head, supposing it entire to the court to judge of this verdict, whether the facts therein mentioned infer art and part, yea or not ; the pannel is advised, that these facts do not necessarily infer art and part, without which the pannel cannot be condemned to suffer the pains of law. For, supposing these facts should make it probable that he was art and part, such probability must pass for nothing in a criminal cause. It is one of the blessings of a free government, that men are not to be condemned upon probabilities and presumptions, but upon direct and positive proof. In this view let us take the circumstances to pieces. The first is, that the pannel threatened harm to the deceased Alexander Henderson, but it is not said what sort of harm was threatened : The pannel's counsel are at liberty to suppose, that a box on the ear was threatened, or some slighter injury ; and if so, that circumstance must go for nothing : the *malum minatum* must always correspond to the *damnum secutum*, or it cannot be of the smallest weight. The second circumstance is, That the pannel, time and place libelled, was seen near the foresaid Alexander Henderson. This circumstance, for ought appears in the verdict, might be common to him with many others, especially upon the public street of a town, where the scene of action is laid in the libel. The last circumstance is, That the pannel had a sharp-pointed unfolded pen-knife in his hand. So might others have, very innocently, or guns or pistols : such a circumstance is just nothing at all, where it is not said that the weapon was used, or that there was any blood upon it. And as it is found not proven, that the pannel was the person who stabbed or wound-

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ed the defunct, his having a pen-knife in his hand, a very common play-thing for children, cannot infer the smallest presumption. And indeed, considering the pannel's age, it would be too wide a stretch were it even in a civil case, to infer art and part from the above facts. A man happens unluckily to get his death's wound upon the public street of a town; among many others, a boy of twelve years of age is standing by with a pen-knife in his hand, cutting a loaf with it; it would be strange to draw from this circumstance any consequence.

But it is unnecessary to enlarge upon this point, which in effect is given up in the memorial for his Majesty's Advocate. It is there urged, That though the court have no power to alter a verdict; yet, where a special verdict is given, they may supply any dubiety or defect in the verdict, by comparing it with the proof. For example, the verdict bears, That the pannel threatened harm to the defunct: The court must supply the dubiety of this part of the verdict, by determining the species of threatening, from considering the proof. *2do*, The verdict bears, That, the time and place libelled, the pannel was seen with the defunct, having a pen-knife in his hand: The court may gather from the proof, that there was no other person present.

The pannel cannot admit of this appeal to the proof, for the reasons mentioned above. But supposing, for argument's sake, it were competent for the court to supply any defect in the verdict from the proof, this will not serve the prosecutor in the present case. It is extremely evident from the proof, that it was the pannel who gave the Henderfon his death's wound, or that he was not guilty at all; and as the verdict finds, that it is not proved that the pannel was the person who stabbed or wounded the defunct, it will not be said that the court has a power to find contrary to the verdict. The facts, as they stand upon proof, are, That the pannel, carrying two water-pitchers, set them down near Janet Thomson's door, and was cutting a loaf with a knife, when Alexander Henderfon came up to him, and struck him in the face with his fist. The pannel said, he

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would

would not take that off his hand, but would gi' him as good again, and that he would tak him with a stane. Henderson answered, he durst not. What immediately followed is not said. But it is proved, that the pannel went forward about a dozen of yards, and in a little space returned with the knife in his hand; and soon thereafter Henderson appeared, and said, that he was stabbed by the pannel. And the pannel, being quarrelled for having wounded Henderson, answered, "That's to learn him to meddle with me; I'll gar him as good as he had na cuff'd my lugs." There is surely nothing in this proof to supply any dubiety or defect in the verdict; on the contrary, with regard to the facts condescended on in it, the proof rather softens than strengthens them: For it appears, that the harm threatened by the pannel was not that he would kill Henderson, but that he would gi him as good again, *sciz.* that he would return Henderson's blow, and that he would throw a stone at him. In the next place, it does not appear from the proof that there was no other person present but the pannel when Henderson was stabbed. And his having a pen-knife in his hand is a very innocent circumstance, when it is proved that he was making use of it to cut and eat a loaf. In a word, the quarrel betwixt the pannel and the defunct appears to have been such a one as is commonly among children. The defunct begun it; and all that is proved against the pannel is, that he endeavoured to return the blow: than which nothing is more natural among children, as well as among men. There is nothing in the whole that can in the least degree point at the pannel's having an intention to kill the defunct, or that he was accessary, by being art and part with another.

The case of the Master of Burleigh, August 1709, is cited as parallel to the present; but, with submission, it is nothing a-kin to it. The facts found proved by the verdict did sufficiently support the libel, and did necessarily infer, that it was the pannel who killed the defunct: for what can be more direct, than discharging a pistol at a man, two wounds received by two balls, which proved mortal? This is as direct an evidence of killing by a pistol as possibly can be;
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for no man ever followed with his eye a ball going out of the mouth of a pistol, and entering the body of the person who was killed; and therefore that part of the verdict, finding it not proven, that the wounds were given by the shot of the pistol, is justly termed an absurd adjection. This then is the case of a verdict which fully supports the interlocutor upon the relevancy and the libel; and there being in it sufficient matter found to infer the conclusion, sentence must pass. And it can afford no argument to the pannel, that matter is added which is not to the purpose, and which is idle or superfluous. The present case is the direct opposite. The matter contained in the verdict does not come up to the interlocutor, or support the libel. If the court is to take upon them here, it must be to add new matter, not to neglect or throw aside superfluous matter.

The counsel for the pannel come now to a separate point, which is, to consider the effect of the pannel's nonage, supposing him to have been the person who stabbed Henderson. And upon this point, which is a very delicate one, and in which there is such a wonderful diversity in the opinion of authors, and customs of different countries, they shall, in the first place, endeavour to lay down some principles; and, in the next place, examine how far these principles may be supported by the best authorities.

To constitute a criminal action, two things must concur; the intention of the actor, and the consciousness of doing wrong. There must be intention, to connect the person with the action; and there must be consciousness of wrong, otherwise madmen and idiots may be as capable of guilt as a man in his sober senses. That a boy of twelve years of age may be guilty of a crime, appears pretty plain from these premises: he is undoubtedly capable of intention; and that he may have also a consciousness of wrong, must be admitted by every person (and it is hoped there are many of these) who agree in the doctrine, that the rules of right and wrong are not left to education, or to be picked up by accident, but are writ by the Almighty upon the table of our hearts.

But though the above must be admitted in general, yet nonage implies two very pointed limitations. One is, that as the principles of morality must be allowed to be greatly strengthened by time, education, and example; children, though conscious of doing wrong, are to be more tenderly handled than those who are arrived to manhood. But as this consideration cannot be reduced to a precise rule, it must necessarily be left *in arbitrio judicis* to determine a greater or lesser punishment, according to circumstances. And the counsel for the pannel won't take upon them to say, that this limitation must, in every case, have the effect to relieve from capital punishment. They believe, that cases may be imagined, where a boy twelve years old may deserve a capital punishment: though such cases have seldom happened, and it is hoped will seldom happen; for it gives but a disagreeable prospect of humanity, to find extreme wickedness so early, and so deeply rooted.

The other limitation is still of greater importance, at least must have a greater effect in practice. Children are more ignorant of natural operations, than of the rules of morality: the latter are writ in their hearts, the former are only picked up by experience. If one of perfect age kill another with a lethal weapon, there is no occasion for a separate proof of intention; it is presumed from the fact. But the case is very different of children, who are not supposed to know, because, in fact, they seldom know, the natural effect of any of their actions. If a boy stumbling upon arsenic shall throw some of it into another boy's drink, the law will not presume intention of poisoning. To infer this intention, there must be an accumulation of many other circumstances, tending to make out that the thing was done deliberately, *et eo animo*. Here then is the great distinction betwixt children, and those of a riper age, that intention will not be inferred singly from the fact, without the concurrence of other circumstances; whereas, in those of riper age, the fact alone presumes the intention.

In this matter we cannot appeal to a more satisfactory authority than the law of England, which, in most cases, is fundamentally the

the same with our own. The following positions are laid down by Chief Justice Hale, in his Pleas of the Crown, vol. 1. chap. 3. *1mo*, That an infant about fourteen, is equally subject to capital punishment with those of full age; for it is *presumptio juris*, that after fourteen they are *doli capaces*, and can discern between good and evil. *2do*, An infant under the age of fourteen, is not presumed to be *doli capax*; yet if it appear to the court and jury, that he is *doli capax*, and could discern between good and evil at the time of the offence committed, he may undergo a capital punishment. But then the judicious author subjoins this limitation, "That there ought to be strong and pregnant evidence to convict one of that age, and to make it appear he understood what he did." The same in substance is laid down in Bacon's new Abridgment of the Law, tit. *Infancy and Age*, p. 130. "It has been already observed, that one above the age of fourteen, or of the years of discretion, may be guilty of a capital offence, in the same manner as one of full age; also that one under these years, if above the age of seven, may, according to the circumstances of the case, (as if, in murder, he hides the body slain by him, makes excuses, or otherwise shews such signs of cunning as demonstrate him capable of discerning between good and evil), be guilty and convicted of a capital offence; but that, in these latter cases, the judges may respite judgement, or execution, in order to the obtaining the King's pardon."

Nor does the Roman law differ, as indeed there cannot well be a wide difference in laws which are established upon the common principles of human nature. The multitude of domestic slaves in Rome made a severe law necessary, That if a master was privately murdered within his house, every one of his slaves should suffer death. Those under age were excepted; and justly, because they were presumed not to be *doli capaces*. Yet a case is laid down, *l. 14. De senat. consult. Silan.* the same which is cited in the other memorial, where a boy under age, suffered capital punishment upon strong circumstances, which inferred his accession to the murder: "Excipiuntur senatusconsulto Silaniano impuberes servi. Trebius autem Ger-
" manus

“ manus legatus etiam de impubere fumi iussit supplicium: et ta-
“ men non sine ratione: nam is puer nec multum a puberi ætate ab-
“ erat, et ad pedes domini cubuerat, cum occideretur, nec postea
“ cædem ejus prodiderat; ut enim opem ferre eum non potuisse
“ constabat, ita silentium præstitisse etiam postea certum erat.”

Upon these principles it seems to be exceeding clear, that the pannel, supposing him to have been the author of Henderson's death, ought not to be found guilty of any crime upon the above proof. Supposing that it was a stroke with his pen-knife which occasioned Henderson's death, it must not be presumed, merely from that single fact, that the pannel, a boy of twelve years of age, had any intention to kill. The presumption lies for his innocence, until that presumption be taken off by strong and pregnant evidence (as Lord Hale says) to make it appear he understood what he did. And his counsel have no difficulty to submit his case to the court upon the proof, that there is not a single circumstance in it to infer such intention, abstracting from the precise act itself, supposing it to have been proved.

They will make a further appeal to the court, that there are in this proof strong circumstances to aid the presumption in law, that the pannel had no intention to murder. Henderson was the aggressor; and in the first motion towards revenge, it appears that the pannel had nothing further in view than the *lex talionis*, to repay a blow with a blow, or at least with a stone. This appears to have been his professed intention; and as wrath is generally greatest at first, we cannot presume any alteration of his intention, since there does not appear any new provocation. It is next to be observed, that after committing the unhappy deed, if it was he who did it, so far from being conscious of having done any mischief, that he came back with the knife in his hand, openly saying, “ That's to learn
“ him to meddle with me; I'll gar him as good as if he had not
“ cuff'd my lugs;” plainly pointing at a blow he had given the de-
funct; for he could not possibly have talked in this manner had he
imagined that he killed Henderson. His language was plainly
that

that of children, when they excuse themselves for squabbling with one another. The thoughts of giving his neighbour a death's wound must have put him in the utmost confusion and consternation, had he even done it innocently. But one further circumstance shall be taken notice of, deponed by John Benny weaver, to show how innocent the pannel must have been of a design to murder. John Benny depones, "That when the pannel came back, having a knife in his right hand, Robert Burnet, after looking into the defunct's side, held up his fist to the pannel in a threatening way; upon which the pannel hid the knife under the skirt of his coat." This circumstance shows both the pannel's childishness, and ignorance of the fact he had committed. So little thought had he of mischief done by him, that he returned to his water-pitchers, with the knife in his hand as before. And to leave no room for attributing this behaviour to stubbornness of temper, the moment Burnet tells him of the deed he had done, he turned afraid, and endeavoured to hide the knife under his coat. This is also a very lucky circumstance to prove the pannel's childishness; for could any but a mere child think of mending the matter by hiding the knife under the skirts of his coat, which the moment before was seen in his hand by many?

Neither has the prosecutor any thing in the character of this infant to build upon, for counterbalancing the presumption of innocence. William Bread flesher, and Janet Thomson relict of James Gilchrist, depone, That the pannel is a sagacious and smart enough boy; Bread adds, he knows nothing of his being vicious or wicked, more than other boys; and Janet Thomson says positively, that he is tractable and good-natured.

It is very true, the verdict finds him *doli capax*: and how this is to be explained, in consistency with the proof, the pannel's counsel acknowledge themselves utterly at a loss to comprehend. But the short answer is, That if the verdict be taken as it stands, which it ought to be, without regard to the proof, the pannel cannot be condemned, upon that verdict, in any punishment. If the proof be taken

taken in to explain the verdict, as is pleaded for the King's Advocate, the *capacitas doli*, found by the verdict, cannot possibly have any other meaning than this, that the pannel being proved to be a sagacious and smart boy, must be capable of evil as well as of good. The jury, from this proof, could never possibly imagine, that the infant had any intention to commit murder; every circumstance in the proof pointed the other way.

The pannel's counsel will make no apology for the length of this paper. The matter before the court is of so great importance, as it concerns the public law of the kingdom, and the safety of the subject in criminal trials. Whatever is done upon this case will be a precedent for future times; and the court will be upon their guard against making any stretch, which in bad times may be used as a foundation for more arbitrary proceedings. This is a matter of greater consequence than even the life or death of a pannel; not to talk of an arbitrary punishment to be inflicted upon a child, all that is intended by the present prosecution.

January 8. 1750. The court banished him to the plantations for life.

Adv. W. Grant

Alt. Henry Home.

N^o 56.

January 1750.

HIS MAJESTY'S ADVOCATE,

AGAINST

ROBERT BEGGS, foldier.

Venus nefanda.

THE indictment sets forth, "That where, by the just and holy law of God, whoso lieth with any manner of beast is declared accursed, and thereby it is commanded that he shall surely be put to death; and by the laws and practice of this and all other well-governed realms,

Jan. 1750.

The KING against BEGGS.

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realms, the horrid, unnatural, and most abominable crime of bestiality, or lying with a beast, or attempting to do the same, are highly punishable with the severest pains; yet true it was," &c.; and then it charges him with having committed this crime with a cow tied to a stake, on the 2d August 1749; at least he was seen attempting to commit the said crime, time and place foresaid: Likeas he having, immediately, or soon thereafter, been apprehended, he did, on his knees confess, and wish, that what he had done might be the means of making him a Christian, or words to that purpose, and this before several witnesses: "Which facts, or part thereof, being found proved by the verdict, &c. he ought to be punished most exemplarily "with the pains of law, to the terror," &c.

His counsel admitted the relevancy of the libel; and only insisted, that the actual commission of the crime, and the *conatus* or endeavour, merited, in the eye of law, different degrees of punishment; and quoted the case of Oliphant in 1734; and therefore hoped the court would determine the relevancy in this case, as they did in that.

The Advocate answered, he did not desire a different interlocutor.

January 8. 1750. The court found the crime of bestiality relevant to infer the pains of death, and confiscation of moveables; and, *separatim*, found, "that the said pannel his having attempted to commit "the foresaid crime, relevant to infer the pains of law *."

The jury, by a plurality of voices, found the indictment not proved; upon which he was dismissed.

Act. W. Grant, &c.

Alt. A. Pringle, Miller.

* The indictment and interlocutor are in the same words with those in the 1734 against Oliphant. 11th November 1702, Thomas Fotheringham was convicted of this crime on his own confession; upon which he was adjudged to be strangled at a stake, and his body thereafter to be burnt; and the Bailie of Kincardine was ordained "to "cause the mare belonging to himself, and the two cows belonging to Elisabeth "Burn and Francis Heaggins, with which the said abominable crime was committed, "to be put to death the said day."

N^o 57.

November 1750.

The ROYAL BANK of Scotland, with concurrence of his Majesty's Advocate,

A G A I N S T

Serjeant JOHN YOUNG.

Forgery.

HE was indicted for forging and counterfeiting notes, resembling those issued by the Royal Bank, and for using and taking value for notes so counterfeited. The indictment was laid upon the laws of this and all other well-governed realms, and a decree of the court of session against him was produced, and referred to.

The court found, "That the pannel, the time libelled, having forged and uttered the sixteen twenty-shilling notes, and one five-pound note, resembling those of the Royal Bank, in the way and manner libelled, or that he was art and part thereof, relevant to infer the pains of death, and confiscation of moveables," &c.

November 12. 1750. The jury, all in one voice, "in respect of the said decret, find John Young the pannel guilty art and part of the crimes libelled."

The court adjudged him to be hanged; and he was executed accordingly.

Att. W. Grant, Lockhart, Ja. Erskine.*Alt.* Hen. Home, Miller.N^o 58.

N^o 58.

1750.

JEAN FULTON, widow of the deceased John Fulton of Auchenbathie, and his Majesty's Advocate,

A G A I N S T

DAVID MALLOCH Officer of Excise.

Murder. — Exceptions to the style of a verdict.

HE was indicted for murder, "in so far as he having conceived a causeless malice or ill-will against the deceased John Fulton of Auchenbathie, which he had been frequently heard to express, and particularly to threaten that he would pistol him, at length found an occasion to meet the said John Fulton upon the high-road, betwixt the village of Pollockshaws and a place called the *Cat-craigs*, both in the parish of Eastwood and shire of Renfrew, in the night between the 2d and 3d days of April last; and then and there, in prosecution of his wicked and deadly malice, without any just cause or provocation, cruelly murdered the said John Fulton, by firing a pistol loaded with ball into his left side, of which wound the said John Fulton instantly died, or in a few minutes after: at least, at the time and place aforesaid, the said John Fulton was, without any just cause or provocation, inhumanely and cruelly invaded and murdered; and of which murder the pannel is guilty, actor, or art and part."

He pleaded, Not guilty; and set forth in his defence, That having got information, that a quantity of smuggled spirits were to pass by the road leading from the west coast to Glasgow, he repaired, in company with Mango Campbell, another officer of excise, to that road, upon the night libelled; and having got further information, at a place called *Woodnuik*, that two men, with a horse-load of spirits, had passed by that place, going eastward; he, with his fellow-officer, and another person whom he called to his assistance, proceed-

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ed, in order to come up with them, and make a seizure: That he having got a little way before his companions, overtook the two men with the spirits; and in prosecution of his duty, insisted they should surrender them to him; upon which the two men, of whom the deceased was one, and who was in use of resisting and invading officers of the revenue, attacked him; and he having called out to his companions for assistance, the deceased drew a pistol, which he presented, and snapped; but it missed fire: and this attack by the deceased was seconded by the person with him; who first threw a stone at the prisoner, and then assaulted him with a broad sword. Upon this the prisoner being in imminent danger of his life, and of being deformed in the execution of his office, did fire a pistol; which, if it occasioned Fulton's death, he himself was only to blame: But the prisoner had a good defence, both at common law, and by the 9th of Geo. II. which makes it lawful for officers of the revenue, when resisted or attacked in the execution of their office, to oppose force to force; and provides, that if any person so resisting shall be wounded, maimed, or killed, and the officer prosecuted for the same, he may plead the general issue, and give the act and special matter in evidence; and all justices, &c. are ordained to admit him to bail.

It was answered by the crown-lawyers, That they did not contest the relevancy of this defence, or the propriety of allowing the prisoner a proof of it; but that it was libelled, and would come out upon evidence, that he had conceived a deadly malice against the deceased, which he had expressed a considerable time before, and threatened to put an end to his life by shooting him: That it would be proved, the deceased was of a soft and timorous disposition, not apt to resist, and far less attack the King's officers; whereas the prisoner was of a passionate and vindictive temper, and too ready to take revenge by pistoling, as is vouched by the record of court; from which it appears, that he was tried at the circuit at Air in 1741, for firing a pistol, loaded with drops, at Patrick Murchie, and putting out one of his eyes; and the jury, all in one voice, found it proved, That he had fired a pistol at the said Patrick, which wounded

wounded him in the back, buttocks, and thighs, and that the said Patrick's eye was wounded, so that the sight of it was lessened, tho' not quite taken away; and that the provocation the prisoner had received from the said Patrick, by striking him over the head with a small rod, though it might alleviate, was not sufficient to exculpate. In consequence of which verdict, the court found the prisoner, and James Innes, who was art and part with him, liable in L. 60 Sterling to the said Patrick, for damages and expences, and in L. 2 Sterling of fine.

Replied for the pannel, It was improper and incompetent to bring the former conviction now into judgement against him, as he had already satisfied the law for that offence. Besides, it was not libelled upon.

Duplied for the prosecutor, Though the former conviction be not libelled upon, yet as it is matter of record of this court, and cannot be disproved by any evidence on the part of the prisoner, it may be competently referred to in this trial. Besides, as the prisoner proposes to adduce evidence, to prove, that the deceased was in use to make resistance, by attacking officers of the revenue when seizing his smuggled goods, in order to create a presumption, that such attack was made upon the prisoner as would justify the homicide charged against him, it is material for the prosecutors, to prove the prisoner's temerity, and his natural propensity to gratify his revenge by the improper use of fire-arms.

The prisoner's counsel likewise took some exceptions to the general charge in the indictment: but these were frivolous, and but faintly stated.

The court, upon advising informations, pronounced an interlocutor, finding the libel relevant, and allowing the pannel to prove, &c.

The jury, "all in one voice, find the said David Malloch guilty of the crimes libelled."

It was moved, in arrest of judgement, That the verdict was faulty; 1st, because, though it bore, the jury had considered the indictment,
interlocutor

interlocutor thereon, and proof in exculpation; yet it did not bear they had considered the proof of the libel; so it was not *plenum et perfectum*. 2dly, It was erroneous in another particular; for it finds the pannel guilty of the crimes libelled, whereas there is but one crime libelled. 3dly, It does not find the death of Auchenbathie proved.

Answered, to the *first*, The omission is immaterial. It is a mere piece of form, and not a very ancient one, to mention the proof, &c. The jury were present while the proof was leading, which lasted twelve hours; so there was no necessity for saying they had considered it. To the *second*, What probably led the jury to find the pannel guilty of the crimes libelled, was the previous threatening by the pannel against Auchenbathie. To the *third*, Finding the pannel guilty of the crimes libelled, carries with it a proof of Auchenbathie's death.

The court repelled the objections to the verdict, and adjudged him to be hanged.

January 1751. He obtained a pardon, which he produced, and pleaded before the court; and it was admitted in common form. At the same time a petition was presented for the widow and children of the deceased, praying an assythment. The court of judicary remitted to the Barons of Exchequer to modify it. The Barons modified L. 100 Sterling. Malloch afterwards insisted in a process of *Cessio bonorum* against all his creditors; upon which the widow and children of the deceased appeared, and pleaded, That such process was incompetent against creditors for an assythment, as that is due *ex delicto*. And so the Lords found, Nov. 19. 1751. — See Lord Kames's Remarkable Decisions, N^o 126.

Act. Miller, et alii.

Alt. P. Wedderburn, et alii.

N^o 59.

July 1751.

His MAJESTY'S ADVOCATE,

A G A I N S T

THOMAS GRAY, Christian Duncan, James Syme, and Thomas Brown.

Forcible abduction and forcible marriage. — Not necessary that the jury hear the debate on the relevancy. — Arbitrary punishment.

THE criminal letters against Thomas Gray and Christian Duncan, set forth, That where, by the laws of God, and of this and all other well-governed realms, the ravishing of women, or the forcible abduction or violent carrying away a woman from one place to another, with intent either to violate her person, by lying with her carnally, or to force her to a marriage against her will; and the celebrating, or the causing a marriage, or the form thereof, forcibly, and by concussion, to be celebrated betwixt a man and a woman, without the free consent, and against the will of such a woman, are crimes of a heinous nature, and severely punishable; especially when such force and violence is used by or on behalf of a man of desperate circumstances or broken fortune, and against a woman who is minor, under age, and possessed of a land-estate, or otherwise of considerable fortune or substance; and when any of the actors or accomplices was herself a woman, trusted by the young woman suffering wrong, or her parents, to accompany her for a limited purpose, and abused and betrayed that trust; and when the different actors added a fraudulent conspiracy or machination to force and violence: Yet true it is and of verity, &c. And then it is particularly charged, That Thomas Gray, a man of desperate fortune, having found means to get into the company of Jacobina Moir, only child of the deceased James Moir of Earnslaw, then in the fifteenth year of her age, did, in order to remove all suspicion of

of his real intentions, pretend, that he was to be married to a jeweller's daughter, with whom he was to get a fortune; and afterwards attempted to get into a correspondence with the said Jacobina, and addressed letters to her at different times, and way-laid her on the streets of Edinburgh when passing to her schools, and pressed her to walk with him; but she having returned his letters, and refused his solicitations with disdain, he did, in order to possess himself of her fortune, contrive a wicked scheme of getting her person into his power, and entered into a confederacy for that purpose with Christian Duncan, milliner or mantua-maker in Edinburgh; who, to serve his views, got acquainted with the said Jacobina and her mother. That in the afternoon of the 3d of May 1751, the said Jacobina did, with the permission of her mother, and attended by a young woman about sixteen, accompany the said Christian Duncan from Edinburgh to Canonmills in a hackney-coach, where they drank tea with the said Jacobina's mother, and then proceeded to Leith; from whence it was agreed the said Jacobina and her servant should return straight to Edinburgh in the coach with the said Christian Duncan, who pretended that she was to carry up some smuggled goods then lying at Leith. Accordingly, between five and six in the evening, Christian Duncan carried them to a house in Leith; and having sent the servant out of the way on a pretended errand, left Jacobina alone in a room; and then Thomas Gray entered: but upon her refusing to stay in the room with him, and calling out, Christian Duncan returned into the room, affected surprise at seeing Gray there, and caused him to retire; and upon the return of the servant, Jacobina seeing none of the goods Christian Duncan had mentioned, insisted to be carried back to her mother at Canonmills: with which desire Duncan pretended to comply: but instead of causing her to be carried back to the Canonmills, or to Edinburgh, Duncan acting in confederacy with Gray and James Syme, one or other of them, by giving private directions to the coachman, caused her to be carried in the coach, without her consent, and against her will, several miles

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miles out of the way along the sea-side, as far as Musselburgh water, where the coach turned, and brought them near to the west end of the sands of Musselburgh. By this deviation, the day being far spent, and night coming on, and few or no company passing the road, Gray and Syme came up on horseback to the side of the coach, alighted from their horses, and Duncan having opened the coach-door, they went into it; and Gray declared his determined resolution of being married to the said Jacobina that night; who being greatly alarmed, fell a-crying, and shed tears; and the said Gray threatened to carry her on board a boat, which he said was waiting on him at hand, and put her in a ship, and carry her to some distant place, where she should never see her mother, or any of her friends again, unless she complied with his desire of being instantly married to him; and then he sent the coachman, with the two horses which had brought him and Syme thither, to Jock's Lodge, to bring from the house of Helen Brown, a gentleman, who, he said, was there waiting for him; the coach, in the mean time, standing still, and all the said company in or about it: and the coachman having returned, with Thomas Brown, *alias* William Jamieson, who was said to be a minister, he also was brought into the coach, and there took upon him to celebrate a marriage between the said Thomas Gray and Jacobina Moir, without the consent and against the will of the said Jacobina, who was crying and shedding tears: after which Thomas Gray ordered the coach to drive directly to the house of Helen Brown at Jock's Lodge, where they forced her to sign marriage-lines: and then Gray, with the assistance of Christian Duncan and James Syme, attempted to fling the said Jacobina on a bed, in order to consummate the pretended marriage; but she preserved herself from falling upon the bed, by laying hold of the curtains; and calling out for aid, he consented to return into the coach; and they all having gone into it, they set her down at her mother's house in Canonmills about two o'clock of the morning of the 4th of May: and the said Jacobina Moir and her servant, immediately on

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their getting home, informed her mother, and father-in-law, of the misfortunes and distresses they had met with, &c. *.

Syme and Brown were separately indicted; and after both libels were read, the pannels pleaded, Not guilty: upon which the Advocate moved, That on account of the connection, the libels should be conjoined, and the trial proceed on both at once, unless the pannels would insist to have the trial divided, that they might have the benefit of one another's evidence, in case any of them were acquitted. The counsel for the pannels answered, The prosecutor might carry on the trial as he pleased; and though they did not consent, yet they did not mean to object; because, whatever exculpatory evidence would be sufficient to acquit any of them, would be sufficient to acquit all of them.

The court, July 15. 1751, "in respect the pannels do not object, "nor insist for separate trials, conjoined both libels, and declared "they would proceed in the consideration and trial of both at one "and the same time."

Counsel were heard, and informations ordered.

It was, in the *first* place, pleaded for the pannels, That the whole essence of the crime consisted in the alledged forcible marriage; and it appeared from the libel the marriage happened on the west end of Musselburgh sands, within flood-mark; and therefore, in the first instance, it could only be tried before the admiral; act 1681, c. 16.

Answered, The libel says, the forcible marriage was celebrated "on the west side of the burn or stream of water which runs "through the west end of Musselburgh sands into the sea." It does not appear from this, that the coach stood within the flood-mark; for the road from Musselburgh to Edinburgh, which is mostly used at high-water, passes through the Friggat-whins, and then crosses the burn not far above where it enters upon the sands, but so far up

* Before their trial came on, while in prison, they preferred a petition to be admitted to bail; insisting, that the crime was not capital. The Advocate put in answers, contending the crime was capital; and therefore opposing the demand. But the court admitted Gray, Duncan, and Syme to bail.

as to be a passable road at high-water, that is, without the flood-mark. And supposing it should come out upon proof, that the place where the coach stopped was within flood-mark, yet still in reality it was upon the King's highway betwixt Musselburgh and Edinburgh, or betwixt London and Edinburgh; because travellers take the benefit of the sands, as equally near, and better road, unless at high-water. Now it would be strange, if the law so stood, that a crime committed upon a public road, within the county of Edinburgh, should not be triable by this court, supposing that crime had no connection with any thing else done upon other parts of the kingdom where the sea-water never comes.

But that is not the case here. For the crimes charged consist of a series of facts, tending to the accomplishment of a criminal and wicked design, and committed at Edinburgh, Leith, and Jock's Lodge, as well as upon the road. The forcible abduction was begun from Leith, although, in the course of it, the coach passed along the sands of Musselburgh; many of the other facts relating to the forcible marriage, were devised, prepared, and prosecuted, upon dry land, far without the flood-mark; and as the admiral could have no jurisdiction as to the offences committed on land, yet these being all links of the same chain, and *partes ejusdem negotii*, if this court had no jurisdiction, they could not be punished at all, which would be absurd.

Lastly, This is not a maritime or sea-faring question, as to which only the admiral has an exclusive jurisdiction, by the act 1681 *.

The *second* objection was to the relevancy of the libel. Forcible marriage is not, *per se*, a distinct crime, separate from the force used to bring it about. Force is no doubt punishable in every case: but to bring about a marriage by force, is not more criminal by common law, than to bring about any thing else; for such a marriage is, *ipso*

* There was a great deal of argument upon this point, but it is unnecessary to state it, as it was repeated in Mungo Campbell's case, and the point settled by the judgement in his case.

jure, void: and if there was no violation of the person, no bad consequences arise from such a marriage. The libel therefore ought not to have been laid upon a forcible marriage, but upon force and oppression in general.

But further, though a forcible marriage was in itself a crime, yet, separate from the force, it is not a crime punishable by the law of Scotland. It is a first principle of reason, That no man ought to be punished for doing that which neither the law of nature, nor the law of the country in which he lives, has forbidden: now there is certainly neither statute nor custom in this country, making forcible marriage a crime; nor does the law of God, or the Civil law, make any mention of it, though they declare rape, and abduction *libidinis causa*, to be punishable.

At any rate, though the court should find forcible marriage to be criminal, yet the punishment cannot be capital, but only arbitrary; and this has been already determined in effect by the judgement finding the crime bailable.

Answered, The prosecutor will take it for granted, that a forcible marriage, is, *per se*, a crime or iniquity that ought to be punished, though the counsel for the pannels have been pleased to dispute that proposition; but he apprehends their argument is too extravagant to require a serious confutation.

As to the degree of punishment, the question, no doubt, is in some measure prejudged by the opinion given on the petition for bail. However, as that opinion was given upon a summary cognition, for the single purpose of determining whether bail was competent or not, it cannot be conclusive on either side in the trial itself: and as this question has not hitherto been determined, the prosecutor thinks it his duty to move it now, as a judgement upon it must be of use to let the subjects know how the law stands, and to let the legislature itself see whether it be in any respect defective.

The opinion given by the court on the petition for bail, proceeded from a just tendernefs in the judges, which made them hesitate to find a crime capital, when there was no positive law, custom,

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custom, or precedent, to warrant them for so doing. It is certain however, that several crimes are capitally punished in this country, without any positive law or usage authorising the court to go that length. This is the case with the frequent crimes of theft and forgery; and the usage, which is now inveterate, could not have had a beginning, had the objection in question been good; and it is to be considered, whether the reasons which determined the court to introduce capital punishments into this country in other cases, without express statute, may not equally be applied to this case, which is new, there being no more precedent for punishing the crimes in question arbitrarily, than there is for punishing them capitally.

This is a new and undecided case in this country, because it rarely can happen, that a forcible abduction of a woman shall be made, and after that a forcible marriage, without the last step of a forcible consummation following: for the woman's person coming under the power of the ravisher by the first crime, he generally, and but for pure accident, must have also an opportunity for perpetrating the last. Such case however did occur in England, and is taken notice of by Hale, p. 302. and fully reported by 1st Ven. 243. 3. K. B. 193. In that case the female minor was carried off upon the Thursday, married the Friday, and recovered by her guardian next day from the ravisher, before he had lain with her: yet he was convicted, condemned to death, and executed.

In this country, when cases occur upon which our own customs and statutes have determined nothing, we are guided by the rules of law observed in other countries, Craig, *l. i. d. 8.* upon the title, *Quo jure Scoti bodie utuntur*. Hence it is, that our criminal libels are laid upon the laws of God, and the laws of this and all other well-governed realms; and that the pleadings and papers before this court are full of quotations from the Scriptures, from the Civil law, and from foreign statutes and decisions.

And there is more reason for pursuing this principle in criminal than in civil matters: for the constitution of private rights are more various and arbitrary; but crimes of every sort are offences against common

common humanity, and are equally so in all nations and countries, as much as the distempers incident to the human body; and therefore it is most proper for us, in these matters, to look abroad, to see by what remedies or punishments other nations endeavour to cure or restrain crimes for which we have no fixed punishment.

There is no text in the divine law in which this offence is particularly treated of; but there are texts which divines and lawyers have understood and interpreted to comprehend this case, viz. Exodus xxi. 16. "He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death;" and to the same purpose, Deuteronomy xxiv. 7. Matthæus states the question "*An capite plectendus qui rapuit, non vitiavit?*" and resolves it in the affirmative, for this, among other reasons, That rape was understood by divines to fall under *plagium*, capitally punished by the law of God as above. Voet indeed differs, *Com. ad. tit. ff. ad leg. Jul. de vi pub.* § 6. But he is there treating of a rape or abduction committed *libidinis causa*, on which no violation took place; not of a forcible abduction, followed by a forced marriage, which was the very mischief or injury the abduction meant to accomplish. Mackenzie says, that *plagium* is punished capitally with us, and the crime in question is declared to be capital by the title of the Code *De raptu virginum*; and Perezius, upon this title, agrees with Matthæus in his opinion above mentioned. The same is the law of France, and of the Low Countries; and in England this crime is made capital by special statute, Henry VII. c. 2. on which the trial above mentioned proceeded.

Replied for the pannels, It is admitted that theft and forgery have been capitally punished by inveterate custom: but who can pretend to say in what manner it was first introduced? It may very probably have had the sanction of a statute, which does not now appear; or, the frequency of the crime continuing after repeated arbitrary punishments, might have moved the judges to higher punishments. And with respect to all these old customs, which have hid their venerable heads

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heads in antiquity, the best answer is, *Non omnium quæ a majoribus tradita sunt, ratio reddi potest.* As to the law of God, the stealing a man to make a slave of him, is quite a different thing from carrying a young woman out in a coach for a few hours, and bringing her back to her mother's house at night, without doing her any harm. As to the Civil law, it is certain, that the law of the Code quoted by the prosecutor applies only to the case of *raptus* or *abductio* committed *libidinis causa.* The words are, "Maxime cum virginitas vel castitas corrupta restitui non possit." In this case the prosecutor has all along admitted, that Mr Gray had only a view to Miss Moir's money, so that it cannot be brought under the *crimen raptus*: and even though he had carried her off, chiefly with a view to rob her of her chastity; yet, as no violation followed, according to the general opinion of the doctors, the punishment ought not to be capital.

As to the law of England, it makes absolutely against the prosecutor; it being certain, that before the statute of Henry VII. there was no punishment in England for a forcible marriage. This is clear from what Sir Simon Harcourt said in Swensden's trial, State-Trials, vol. 5. p. 450. In opening the charge as Solicitor-General, he says, "It was formerly reckoned a less crime to steal a fortune of L. 10,000, than to steal twelve pence of her money or goods; but in the third year of Henry VII. to cure this defect in the law, an act of parliament was made," &c. In England therefore the judges had no notion of punishing this crime without a statute; and when we shall have got such a law in this country, it will then be more proper to take notice of the prosecutor's English cases, which are all posterior to the statute. As to the laws of other countries, referred to by the prosecutor, they all relate to the *crimen raptus libidinis causa*, which it has been shown has nothing to do with the case in hand.

July 20. 1751. The court "repelled the declinature offered to the jurisdiction of the court, and found the libel relevant to infer an arbitrary punishment; but allowed the pannels, and each of them, a proof of all facts and circumstances," &c.

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July 23. 1751. The jury, all in one voice, "found both the libels proven against all the above-named pannels."

In arrest of judgement it was pleaded, That though by the act 91. parl. 11. James VI. it was ordained, That the hail accusation, *reasoning*, writs, witnesses, and other probation, should be in presence of the affize; yet when the relevancy was argued, one of the jury who had returned this verdict was not present; and that several of them were absent when the court gave their opinion and judgement on the relevancy.

Answered, Though the alledgeance were true, yet no objection can be grounded on it; the pannels having waved it, by allowing the jurors to be named and sworn without any objection: but in point of law there is nothing in the objection; for all the evidence, and all the reasoning on that evidence, was before the jury, which was all the act required. And so *Mack. tit. Affizes*, understood; and this trial had proceeded as all other trials have done for these 100 years past.

July 24. 1751. The court repelled the objection. Then the chancellor of the jury represented to the court, That though Syme had been found guilty with the rest, yet it was the opinion of the jury he was not so guilty as the rest; and they therefore had desired him to move their Lordships for the favour of the court in his behalf, when they came to pronounce sentence.

The court banished Gray, Duncan, and Brown, to the plantations for fourteen years: As to Syme, "in respect of the foregoing verdict, and of the recommendation of the jury," fined him in 500 merks, to be paid to the clerk of court, to be disposed of as the court should direct; and ordained him to be detained in prison, till 11th November next, and till payment of the fine.

At. W. Grant, Lockhart, et alii.

Alt. A. Pringle, G. Brown, Gilbert Elliot.

N^o 60.

July and August 1752.

His MAJESTY'S ADVOCATE,

A G A I N S T

JAMES MACGREGOR, alias Drummond, alias James More.

Hamefucken.—Forcible abduction.—Forcible marriage.—Rape.—Declaration by the jury that they did not mean to find a capital offence proved, disregarded.

THIS man was indicted, at the instance of his Majesty's Advocate, for the crimes of hamefucken, forcible abduction, forcible marriage, and rape, committed against the deceased Jean Key, a minor, the daughter and sole heiress of the also deceased John Key portioner of Edinbelly, and relict of John Wright, lawful son of John Wright of Easter Glins; and the charge in substance was, That Robert Macgregor, alias Campbell, (then and still an outlaw, by a sentence of the justiciary 1736, for not appearing to stand trial for the murder of John Maclaren of Wester Innernenty), purposing to accomplish a marriage with the said Jean Key, and thereby possess himself of her estate, he, and with him his brother the prisoner, and other accomplices, armed with guns, swords, and other hostile weapons, did, upon the 8th December 1750, in the evening of that day, or under cloud of night, beset, invade, and forcibly enter the house of Edinbelly, where the said Jean Key was residing in family with her mother, and other her relations, and where she was *lying and rising nightly and daily*: That upon this alarm the said Jean Key having hid herself in a closet, the prisoner, and his accomplices, by threats compelled her mother to discover where she was; and then having told her their purpose of obliging her to marry the said Robert Macgregor, and upon her desiring some time to deliberate on such a proposal from a man with whom she had no acquaintance, the prisoner, and his accomplices, laid violent hands on her, and while she was making all

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the resistance in her power, and crying out for help, dragged her to the door, tied her hands with ropes, mounted her upon a horse before the said Robert Macgregor, or one or other of his accomplices, placing her body across the horse, upon the fore-part of the saddle; and in this manner violently carried her off against her will: That she was first carried to a place called *Ruindennan*, afterwards to the upper end of Loch Lomond, where she was detained in captivity, and carried from place to place for three months: That during this her captivity, the prisoner and his accomplices caused the form of a pretended marriage to be celebrated betwixt her and the said Robert Macgregor, without her free consent, and against her will; and under the colour of consummating the said pretended marriage, the said Robert Macgregor, the pretended husband, with the assistance of the prisoner, and others their accomplices, did, at some one or other of the places where the said Jean Key was thus carried and detained, forcibly ravish her, by violating her chastity, without her consent, and against her will. At least art and part, &c.

The indictment referred to several writings, as lodged in the hands of the clerk of court, to be used as evidence against the prisoner; and, among others, to two declarations emitted by Jean Key, before the court of justiciary, of date the 20th of May, and 7th of June 1751; the occasion of which was this.

While Jean Key was in captivity, a petition was presented, by her mother and brother, to the court of session, setting forth her abduction as above, and that several attempts had been made in vain by her friends, with the assistance of a party of his Majesty's forces, to relieve her; and that in the mean time no body had power to manage her affairs, therefore praying the court to appoint a factor upon her estate and effects, with power to apply, out of the same, what sums may be necessary for recovering her from captivity, and bringing the offenders to justice. The court appointed a factor accordingly.

This sequestration was very disagreeable to the offenders, as it frustrated their purpose of getting possession of Jean Key's estate; in
order

order therefore to get it removed, the prisoner brought Jean Key with him to Edinburgh, and a bill of suspension, signed by her and a writer to the signet, was presented; setting forth, That she had been carried off as above with some appearance of violence; yet that that was done in consequence of a concert betwixt her and Robert Macgregor, in order to preserve appearances of decency on her part, she having been but two months a widow; that afterwards she had been formally and willingly married to him, and resolved to live dutifully and decently with him as her lawful husband; upon which account the faculty ought to be suspended, as there was no evidence to be brought of her captivity; and she was ready to appear in court, to show, that she was under no force, constraint, or influence.

This bill, however, was refused by the Lord Ordinary on the 5th of March 1751; and a second bill to the same purpose having been presented on the 18th of the said month, it too was refused by three Lords of Session, who were also Lords of Justiciary. On the same day these Lords held a court of justiciary, and caused Jean Key to be brought before them: and at this time, on examination, "she acknowledged, that she had been with the persons against whom the warrants had been granted on her account; and that she was, upon the Monday after she was taken away, married to the said Robert Macgregor *alias* Drummond, by one who signed his name *Smith*; and that she inclined to adhere to the marriage."

This notwithstanding, the Lords, in consideration of the whole circumstances of the case, the outlawry against Robert Drummond, his, and his accomplices absconding, the evidence of the forcible abduction arising from a precognition that had been taken, the possibility that Jean Key might still be under impressions, the reasonableness of her being sequestered in some proper house, where her relations might have access to her, and where she might be at liberty to determine with herself what is proper to be done, in an event of so great consequence to her; therefore they order her to be carried to a gentleman's house in the suburbs, and that she shall remain and be entertained there by him till the 4th of June next, unless the

court order her to be set at liberty sooner; and that he shall allow access to such of her relations and friends as she chuses to see, but so as not to admit a number of persons together; and that he shall take care she be not forcibly carried off, or allowed to go out of his house, without the order of court; and recommend to the magistrates of Edinburgh, to give their assistance for making these directions effectual, by placing centinels at said house, and other precautions.

On the 20th of May 1751, Jean Key was again brought before the court; and then she gave a full detail of all the circumstances of her abduction, detention, marriage, and its consummation. She declared she had been all along under force, and had been compelled, by threats against her relations, to sign the bill of suspension; but that the writer knew nothing of this; and that she was not willing to adhere to Robert Macgregor as her husband.

On the 4th June she adhered to this declaration; and added, that she had been compelled by threats to copy and sign a letter, bearing date twenty days before her abduction, and containing an invitation to Robert Macgregor to carry her off; the scroll of which letter was drawn by his brother James.

The trial of James came on before the Lords of Justiciary on the 13th of July 1752; when the relevancy of the crimes charged was disputed by his counsel, and supported by the crown-lawyers.

The court having ordered informations, they were prepared accordingly; that for the crown by Mr Grant, then Lord Advocate; that for the prisoner by Mr Lockhart.

The information for the prisoner, in point of fact, pleaded, That the abduction, though apparently forcible, was in reality with her consent, in consequence of the concert above mentioned: and the information for the crown admitted, that this alledgeance, if proved, would be very material for the prisoner's defence; and therefore agreed he should be allowed to prove it, and every pertinent circumstance for evincing or confirming it.

The first defence, in point of law, as relevant to alleviate the punishment, was founded on the act 1612, *against ravishing of women*; which

which provides, That when persons prosecuted as art and part of ravishing women, defend themselves upon the subsequent consent of, or declaration by the woman, that she went with him of her own free will; though that shall exempt them from capital punishment, yet if her parents, nearest in kin, or the King's Advocate, obtain a verdict, finding, that at first the fact was violently and forcibly done against her will, such consent or declaration shall not exempt them from an arbitrary punishment.

This consent, the prisoner argued, might be given in various forms; and was most properly implied from acceptance of the ravisher as a husband; and that would be proved in this case. — Independent of this subsequent consent, the act puts it in the power of the woman to mitigate the punishment, by a declaration *ex post facto* that she had gone with the ravisher of her own free will: and the law does not regard whether this be true or false; on the contrary, it supposes it to be absolutely false, and that upon an after trial it will be proved the fact was at first violently done.

As therefore it appeared from the evidence given for the prosecutor, that Jean Key had, once and again, emitted such declaration, that, whether true or false, must operate a restriction of the punishment; and Jean Key could not afterwards retract it, by which there arose a *jus quasitum* to all concerned, so as to subject them to the pains of death.

If the prosecutor indeed could prove, that Jean Key had been constrained to make such declaration, the case might vary: but he did not alledge this; only would have it presumed, that it had proceeded from the impressions she had received from the violence formerly sustained, and a terror of the like in time coming.

And supposing the import and operation of the statute, as to the principal crime of rape, to be as above stated, a restriction must likewise take place as to the other crimes charged, which were but steps intermediate and preparatory to it.

Hitherto the prisoner had argued upon supposition, that not only rape, the principal offence, was capital, (which he admitted), but that

that the other offences charged were so too; but he was advised, these, in the form and manner charged, were not so.

As to the hamefucken, in ancient times, when deadly feuds and animosities subsisted among many families in this country, there might be some reason for making this crime capital; and no doubt in some old cases, it had been found to be so; but later practice had receded from this severity.—As to the case of Haldane, 1718, it was only by construction or implication the prosecutor could infer, that hamefucken was in that case supposed to be capital; but, as it appears from the proceedings, that point was not argued; Haldane having rested his defence on objections to the form of the libel, the judgement upon the relevancy cannot be appealed to as a precedent.—As to the case of Campbell and Mackinnon in 1725, the judgement was unjust; as the person against whom the invasion was intended, was not in his house when it was forcibly entered. A lift was granted by three Lords of Justiciary; but by some unlucky accident, that was allowed to expire, and execution followed.

But further, the facts charged in this indictment do not amount to hamefucken, unless every injury done to a person in his own house falls under that denomination. The essence of that crime consists in an assault upon a person in his own house, when the act of violence concurs with the *animus injuriandi*. Hence, should a house be invaded in order to burn it, or rob it, however atrocious such offence may be, it would not infer hamefucken, if no assault had been committed upon any person. And upon the same principle, should a rape be committed upon a woman within her own house, though this would be criminal, and capital, yet it would not be hamefucken, as the criminal act did not proceed from any purpose to assault or injure the person, *sed libidinis causa*, l. 39. ff. *De furt.* Now in this case, all the violence is charged or admitted to have proceeded, not from any purpose to assault or injure Jean Key's person, but to accomplish a marriage with her.

As to the abduction, and forcible marriage, to prove these were
not

not capital, the argument and judgement in the case of Thomas Gray was referred to. See N^o 59.

As to the last article of the indictment, which charges an actual rape, that is admitted to be capital: but the defence is rested, *1st*, upon a denial of the fact; *2dly*, upon the proof offered, that Jean Key had previously agreed to the marriage, and consented to her abduction; *lastly*, supposing this concert should not be proved, upon her subsequent consent and declaration as above stated.

As to the competency of admitting as evidence Jean Key's declarations of date 20th May and 4th June, it is at least doubtful whether Jean Key, had she been alive, ought to have been examined as a witness; especially with regard to those particulars, as to which, it is evident from the indictment itself, there could be no penury of witnesses.

The rule of law is, *Quod testibus, non testimoniis, credendum*: and the justice of it is obvious; for no man could be safe if such declarations are to be regarded. The person against whom they are emitted has no opportunity of putting cross questions; the jury have no opportunity of judging of the credibility of what is said from the appearance and manner of the declarant; and he is not under the awe of an oath.—Confessions by parties themselves, have been received as evidence though extrajudicial; and perhaps with reason, as a party's confession is his own act, and may be proved, as well as any other act of his, by witnesses examined in presence of him and of the jury: but it would be dangerous and unreasonable to draw any argument from this, for admitting as evidence against a prisoner the declarations of third parties not upon oath.

The information for the crown, in answer, argued,—As to the hamefucken, that the facts charged amounted to a true, proper, and atrocious hamefucken, punishable as such, supposing the punishment should go higher than the injuries received *per se* would have done, had they been committed upon Jean Key elsewhere than in her own house; as, *e. g.* upon the high-road, or in any other house where she had been accidentally met with. Skene, in his treatise, *De verb.*
sign.

sign. voce Hamefucken, and upon Crimes, c. 9. defines it thus: "It is when any person violently, without licence, and contrary to the King's peace, enters within a man's house, or seeks him at the same, or assailzies his house, (as is written in the best books), which crime is punishable as ravishing of women: which is esteemed a great crime, contrary the common weil, quietness, and peace of the country; *quia unicuique domus sua est tutissimum refugium.*" Nor is this crime peculiar to Scotland; *Mattheus, De criminibus, tit. De vi publica, c. 4.*

The injuries, with intention to commit which Jean Key was assaulted in her own house, were, without comparifon, greater than if the prisoner and his accomplices had been contented with giving her a box on the ear, or had even violently beat and bruifed her. Any thing less than the murder of Jean Key would have been a smaller injury or damage, than what this hamefucken was committed to bring upon her; which was to rob her, not indeed of life, but of every thing that is valuable in it.

It may be true, that in later times, the law of hamefucken has been rarely put in execution: but that is owing to the advancement of civility and good manners in this country. But it ill becomes those who disgrace and shock the present age, by committing barbarities long unheard of, to alledge, the law is obsolete which was introduced for restraining them; as they themselves, by now committing such enormities, demonstrate, that the law should be still enforced for the common safety of mankind.

In truth, the law is still in force, though, like all other penal laws, it lies *asleep* till occasion offers for exerting its terrors: but it is not *dead*; and it will answer in this case to the call of justice, which is *loud for vengeance*. No decision has found, no lawyer said, that it was obsolete. Mackenzie, Forbes, Bayne, teach the reverse.

As to Haldane's case, on the 5th of August 1718, in a full court of justiciary, where were present, among others, the Lord Justice-General, and Sir Walter Pringle, Lord Newhall, this interlocutor was pronounced. "Having considered this libel, and the debate
" thereon,

“thereon, they find the facts as libelled not to be of a nature so atrocious as to infer the crime of hamefucken: And find, the pursuers not having insisted, in their pleading, or in their information, that in case the said facts should not be found to amount to said crime of hamefucken, the libel should be restricted to an arbitrary punishment, as in the case of a riot, the said Lords do therefore desert the diet *simpliciter*; but without prejudice to the pursuers to raise criminal letters, and to insist against the defenders for the riot and atrocious injuries libelled, as accords.” This plainly *supposes*, that the law of hamefucken stands as yet in full force, though it was justly found *not applicable* in that case to take away the lives of a collector of the customs, and four men his assistants, who, with the warrant of a magistrate, lawfully entered the house of a smuggler, though they behaved roughly, and perhaps injuriously, to the master of the house, and the brother of the person there apprehended.

In the case of Campbell and Mackinnon in 1725, the law of hamefucken had its full effect. These men were condemned to death for it. A sist indeed was granted by three Lords of Justiciary till the 16th of June, *proviso*, That if no further stop was granted, the magistrates of Inverness should put the sentence in execution. The view of which was, to give the whole Lords of Justiciary an opportunity of deliberating on the case, they being to assemble as Lords of Session on the 1st of June. On the 8th of June, “The Lords of Justiciary, taking to their consideration, that there was no application made to them by the suspenders, nor the bill produced, or put in the hands of the clerk of court, therefore they declared they would interpose no further in the said matter, but leave the same to the course of law.”——This they never would have done on the bare neglect, perhaps, of an agent to bring back the bill of suspension, on which the stay of execution was granted, had they been of opinion, that hamefucken was no longer a *crime*, or a *capital crime*, by the law of Scotland.

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As

As to the forcible abduction and marriage, the prosecutor is sensible of the disadvantage under which he must plead, that the same may, or ought to be, capitally punished, (for if it *may*, it certainly *ought*), by reason of the judgement in Gray's case, finding the libel *relevant only for an arbitrary punishment*. But in that case the abduction libelled was not *directly forcible*; there was a mixture of *fraud*; and therefore the judgement in that case is not a precedent in point to this, in which the abduction and marriage are libelled to have been brought about by *downright force*. The prosecutor hopes, therefore, he will be forgiven, when he begs leave to treat this question as yet entire in such a case as the present; and to pray the judgement of the court upon it *in this cause*. [Here the argument for the crown in Gray's case was repeated.]

As to the argument for restricting the punishment of rape in this case, the enactment of the statute 1612 is a piece of *mercy* extended to the *guilty* for the sake of the *innocent*. A woman who has been ravished, will seldom have a good chance to obtain an agreeable establishment for herself in marriage with another man. On this account, she is indulged with a power of saving him who wronged her, by taking him for her husband. And no example can be given of a woman who had suffered such injury, and after that gave a declaration of her consent, or that she went with the man of her own free will, that did not at the same time adhere to, and live with the man as his wife; thereby affording the most certain evidence of a *reconciliation* with the offender, and of her election to become his wife, as the least of two evils.

But Jean Key, as soon as truly at liberty, declared her deep sense of the grievous injury she had suffered, and of her abhorrence of Robert Macgregor; and proved her sincerity in this, by avoiding him ever after while she lived.

The consent or declaration intended by the statute must be free and voluntary; but the prisoner has referred to no declaration by Jean Key that can be at all credible, or that is made in unsuspected circumstances, abstracting from the subsequent judicial declarations that

that served to *explain* and *account for*, rather than to *retract*, any former appearances of consent that she had given, whether by way of *stratagem* to get them to bring her to Edinburgh, or after she came there, till she was taken out of the power of this prisoner by the wisdom and justice of this court.

As to the competency of admitting Jean Key's declarations as evidence, — The proof of crimes is not confined to the testimony of witnesses upon oath, but *documents in writing* are admitted; sometimes extrajudicial confessions of the prisoner, sometimes letters, either from or to him, or otherwise relative to the subject of the trial, though the contents could not be written *upon oath*; and many such letters were produced in the late solemn trial of Lord Lovat. If there be any doubt of the veracity of what such writings contain, the jury will make proper allowance for their not being upon oath. In this case, there can be no doubt, that Jean Key spoke what is contained in these declarations, whether that be true or not; for they were taken by the judges of this court, who had no temptation or interest to regard any thing but truth.

Last of all, Jean Key was the person invaded and oppressed by the proceedings complained of at the suit of the King, for the sake of public justice; and she would have been a good witness for the King; but she herself is *now dead*, and was so *before* this prisoner was apprehended. Though hearsay-evidence is not to be admitted, either in civil or criminal cases; yet the *dicta defuncti* who suffered the wrong, the person, suppose, who received wounds, of which he or she afterwards died, are always admitted to be proved by witnesses, and given in evidence; and were so in the late case of Normand Ross, condemned to death for the murder of his mistress.

These informations were advised by the Lords on the 31st of July 1752, when the following interlocutor was pronounced: " Having considered the indictment, pursued at the instance of William Grant of Prestongrange, Esq; his Majesty's Advocate, for his Majesty's interest, against James Macgregor, *alias* Drummond, *alias* James More, pannel, with the foregoing debate thereupon,

“ they find the crimes charged against the said pannel, in the fore-
“ said indictment, *jointly and severally* relevant to infer the pains of
“ law; but allow the pannel to prove all facts and circumstances
“ that may tend, either to the exculpation or alleviation of his guilt;
“ and remit the pannel, with the indictment as found relevant, to
“ the knowledge of an assize.”

The jury returned the following verdict: “ They all in one voice
“ find it proven, That, at the time libelled, the said James Macgregor,
“ *alias* Drummond, *alias* James More, the pannel, with his brother
“ Robert Campbell, *alias* Macgregor, and divers other lawless per-
“ sons, some of whom, and particularly the pannel, were armed with
“ swords, pistols, and other warlike weapons, entered the house of E-
“ dinbelly, which belonged to the now deceased Jean Key, designed
“ in the indictment, and in which she and her mother and family
“ then dwelt and resided, in a lawless, forcible, and hostile manner;
“ and did, within the said house, attack, invade, and lay violent hands
“ upon the person of the said Jean Key, in order to carry her out of
“ and away from her said house: And by majority of voices they find
“ it not proven, That the said Jean Key was privy or consenting to
“ the said Robert Macgregor, *alias* Campbell, or the pannel, or their
“ accomplices, entering the said house, or their design of carrying
“ her off: And they all in one voice find it proven, That the pan-
“ nel, in company of the said Robert Campbell, *alias* Macgregor,
“ his brother, and others their accomplices, the time libelled, for-
“ cibly carried the person of the said Jean Key out of and away
“ from her foresaid house of Edinbelly, to the house of John Leckie
“ maltman in Buchanan, and from thence to a public house at Ruin-
“ dennan, then possessed by Alexander Col MacCol, *alias* Macgre-
“ gor; and there, or in the neighbourhood thereof, put her aboard
“ a boat upon the loch of Lochlomond. But they also all in one
“ voice find it proven, for alleviation of the pannel’s guilt in the
“ premisses, That the said Jean Key did afterwards acquiesce in her
“ condition. And finally, the assize all in one voice find the for-
“ cible marriage and rape libelled, not proven.”

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The court delayed pronouncing judgement till next day. Then twelve of the jurors made tender to the court of a declaration, importing, that they understood, that what they found proved for alleviating the prisoner's guilt, would have exempted him from a capital punishment. A thirteenth juror appeared in court, who declared he had been with the foreman of the jury the night preceding, at his house in the country, when this declaration was sent to him to be signed; which he the foreman refused, as well as the other, who was with him; but the last declared in court, that he concurred with the twelve in wishing an arbitrary punishment only to be inflicted.

The court absolutely refused to receive this declaration; and told the jury, it was altogether irregular, and indeed illegal, and of dangerous example; that the law of Scotland was so highly cautious and jealous of the very possibility of tampering with the jury, that it had been provided by statute, That if, after they are inclosed, and before making out their verdict, any person have but access to talk with them, the pannel shall be, *ipso facto*, acquitted; and that though the declaration now offered was on the merciful side, yet if such practice were to be allowed, it must be equally competent against the prisoner as for him; and it was easy to see what bad use might be made of such practice, if this country should fall under the like rigid or arbitrary government that it had in former times experienced; and that though the court, having no suspicion of any bad motive or intention in the gentlemen who had fallen into this irregularity, did therefore inflict no censure upon them, yet they absolutely refused to take the declaration, and signified their disapprobation of the step.

Counsel were then heard on both sides upon the import of the verdict; after which informations were ordered, and drawn by the same gentlemen who wrote the former. That for the prisoner was first given in *.

* Perhaps regularly, it always ought, as *reus excipiendo fit actor*; but when the prisoner expresses a desire to see that for the prosecutor, it is seldom or never refused. It was easier to abridge the argument in the former informations, by putting the prisoner's first.

Objection 1. for the prisoner. Though the indictment charged, that Jean Key resided in the house of Edinbelly, and was there lying and rising nightly and daily; yet the verdict does not find this proved. And further, though it finds that the house of Edinbelly was forcibly entered, and she forcibly carried from it; yet it does not find, that the entry into the house was with a view to commit that injury.

Answer. The *locus delicti* is indeed essential in hamefucken; but neither law nor reason require a particular form of words to be used by the jury in describing it. They have found the house of Edinbelly *belonged* to Jean Key; that she was residing there; and that she was violently invaded there, in order to carry her away from *her* said house; and that she was accordingly carried away by the prisoner and his accomplices, from *her* *foresaid* house of Edinbelly. As to the other part of the objection, the verdict finds, the prisoner and his accomplices did attack, invade, and lay violent hands on Jean Key, *in order to carry her out and away from her said house*. It might be added, that the very defence pleaded for the prisoner, viz. That the house was entered, and force seemingly used, in consequence of a concert with Jean Key, did imply, and admit, the purpose of the entry was the abduction: but that defence the jury have not found proved.

Obj. 2. The jury have found, that Jean Key acquiesced in her condition, and that this alleviates the prisoner's guilt in the premisses. Though by so finding they should have exceeded their powers; yet if such acquiescence on the part of Jean Key would in law be an alleviation, the prisoner's plea for a restriction of the punishment will not be hurt, by his having for him, on this point, the judgement of the jury, who could have acquitted him totally. The acquiescence ought to alleviate and restrict: for hamefucken is punishable as rape; now as the acquiescence of the woman alleviates and restricts the punishment of rape, so should it that of hamefucken.

Ans. That part of the verdict cannot hurt the preceding, which is pertinent to the issue, and finds the crime of hamefucken, with
all

July 1752.

The KING against MACGREGOR.

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all its requisites proved, *Complete Jurymen, tit. Verdicts, p. 258.*
259. No part of a verdict that is pertinent to the issue, or that contains an intrinsic part or quality of the fact *de quo querebatur*, can be neglected or set aside as superfluous; but it is otherwise when the jury superadd a fact, which, though true, cannot render the prisoner a whit less guilty. The crime is a public one, it may be, and in this case it is prosecuted at the suit of the King alone. Jean Key might remit the personal injury done to herself, but she could not remit the violation of the law, which, on the supposition now made, reduced her to the hard necessity of acquiescing; and which law it is necessary to enforce, that other women may not, by the example of impunity, suffer in the same way. The mitigation introduced by the act 1612, is an indulgence to the *guilty*, for the sake of the *innocent*: and it was the more reasonable, because it is hardly possible to prove rape, without the evidence of the woman herself; as she only can know whether the crime was really perpetrated, and against her will: but none of these reasons conclude for extending this mitigation of the *vindicta publica* to hamesucken; the acquiescence here was but accidental in the case, and owing to other crimes committed after the hamesucken. Had Jean Key been rescued before the marriage by a superior force, there had been no acquiescence, yet the hamesucken was completed: so that the prisoner must maintain, that in the most atrocious hamesucken, though there was no woman or marriage in the case, if the party injured be silent, from imbecility, fear, or excess of good-nature, the delinquent must be screened from capital punishment. This would not hold in crimes less atrocious, such as theft or robbery. The jury have not found the prisoner guilty of hamesucken; but they have found facts against him which amount to that crime. In like manner they have found a fact proved for the pannel in alleviation; but how far it may or ought to go in point of law, did not belong to them to say, nor have they done so. The verdict is special, and the court must apply the law to the facts found.

November

November 20. 1752. The court met to give judgement, but some days before, the prisoner had made his escape. The diet was continued till the 20th December afterwards. He was outlawed for not appearing. — Some years after, he obtained a pardon, returned to this country, and got the outlawry rescinded.

Att. W. Grant, et alii.

Alt. Lockhart, et alii.

N^o 61.

February 3. 1752.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

HELEN TORRENCE and JEAN WALDIE.

Plagium.—Murder.—Plea of pregnancy over-ruled on a report by midwives.

THEY were indicted for stealing and murdering John Dallas, a boy about eight or nine years of age, son of John Dallas chairman in Edinburgh, on the 3d December 1751.

The counsel for the prisoners represented, That however the actual murder might be relevant to infer the pains of death, yet the stealing the child could only infer an arbitrary punishment. And as to the felling the dead body, it was no crime at all.

Ans. Though the stealing the child when alive, when disjoined from the felling it when dead, might not go so far; yet, when taken together, they were undoubtedly relevant to infer a capital punishment.

The court pronounced the usual interlocutor.

The jury brought in the following verdict: " Find, That the pannels are both guilty, art and part, of stealing John Dallas, a living child, and son of John Dallas chairman in Edinburgh, from his father's house, at the time and in the manner libelled; and of carrying him to the house of Jean Waldie, one of the pannels;

“ pannels ; and soon thereafter, on the evening of the day libelled,
 “ of felling and delivering his body, then dead, to some surgeons
 “ and students of physic.”

Counsel were then heard on the import of this verdict, but none of the pleadings are recorded.

Helen Torrence pleaded her belly : upon which the court appointed four midwives to examine her ; and they having reported, that she was not with child, the court adjudged her, as well as the other prisoner, to be hanged.

Act. Solicitor Home.

Alt. Miller, Swinton, Alex. Gordon.

N^o 62.

January 24. 1753.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

ROBERT MACGREGOR, alias Campbell, alias Drummond.

Hamefucken and Forcible abduction capitally punished.

HE was indicted for the same crimes for which his brother James was brought to trial, as stated in N^o 60.

The jury, all in one voice, found, “ That the pannel is guilty,
 “ art and part, of entering, with other lawless persons, armed,
 “ the house of Edinbelly, which belonged to the deceased Jean Key
 “ designed in the indictment, in which she and family then dwelt ;
 “ and in a forcible and hostile manner, within the said house, did
 “ attack, invade, and lay violent hands upon the person of the said
 “ Jean Key, and did carry her out and away from said house.”

The court adjudged him to be hanged, and he was executed accordingly.

Act. Haldane, *et alii.*

Alt. Walter Stewart, *et alii.*

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N^o 63.

N^o 63.

March 1754.

His MAJESTY'S ADVOCATE,

A G A I N S T

ARCHIBALD MACDONALD *.

It is not necessary to remit to a jury defences in fact offered for an attainted person against whom execution is prayed.

HIS Majesty's Advocate preferred a petition, March 3. 1754, to the court of justiciary, bearing, That by an act passed in the 19th year of his present Majesty's reign, intituled, *An act to attain Alexander Earl of Kelly, &c.* Archibald Macdonald, son to Col Macdonald of Barisdale, stands attainted of high treason: That the said Archibald Macdonald was some time ago apprehended, and brought prisoner to the castle of Edinburgh, where he now remains.

That the petitioner having received his Majesty's commands, to proceed before their Lordships, to procure execution to be awarded against the said Archibald Macdonald, upon the act of attainder above mentioned, had given written notice to the prisoner, that he would be brought before their Lordships upon Monday the 11th day of March current, in order to have execution awarded against him; or that he might shew cause, if he any had, why such execution should not be awarded.

That in case the said Archibald Macdonald should refuse, before their Lordships, that he was the person attainted by the said act, it became necessary for the petitioner to adduce witnesses for proving his identity: therefore praying their Lordships to grant letters of diligence, at the petitioner's instance, for citing witnesses, to appear before their Lordships on Monday the 11th instant, to prove, that the said Archibald Macdonald was the identical person who, by the

* The proceedings in this case were printed in 1754. That part of them only is here inserted which respects the question as to the necessity of a jury-trial.

act of parliament above mentioned, stands attainted of high treason, by the name and designation of *Archibald Macdonald, son of Col Macdonald of Barisdale*.

Upon this petition a diligence was granted against witnesses.

Mr Macdonald being brought to the bar, March 11. 1754, the Advocates-depute moved the court to grant warrant, and appoint a day for his execution: and represented, That in case he should deny himself to be the person attainted amongst others by the foresaid act, they were ready to prove the identity by witnesses.

Upon this the prisoner was asked by the court, Whether he had any cause to shew, why execution should not be awarded against him, as being a person attainted by the said act?—In answer he read and gave in a paper of the following tenor.

“ *My Lords,*

“ A person under my unfortunate circumstances is very improper to speak for himself before this solemn audience. I cannot understand myself to be the person attainted by this act of parliament. I was then a boy, lately returned from school, under the influence of a father who was unluckily engaged in the rebellion 1745. If he had not been able to justify or atone for both his own conduct and mine, it cannot be supposed, that he should have passed unattainted, and that I his minor son should be destined for punishment. I therefore humbly implore your Lordships indulgence, to attend to the heads of my defences to this heavy charge, which my learned counsel will explain.

“ 1. I am advised, there is no sufficient evidence produced of the act of parliament upon which execution is craved.

“ 2. I am none of the persons named in the copy of the act of parliament now read. My name is *Archibald Macdonell*; and my father's name was *Col Macdonell of Inverie*.

“ 3. The condition under which the act of attainder was to take place never existed. I rendered myself to one of his Majesty's justices of peace before the 12th day of July 1746.”

His counsel then enlarged upon the defences stated in this paper; and insisted, that the court would remit the facts, of which he offered a proof, to a jury. The Solicitor answered the defences: and as to the demand of a jury, argued, "That in this case, by the law and practice of this court, it is not necessary to try the prisoner's defences by jury; for that, although the trial upon an indictment must be by a jury, yet all incidental questions, such as, a woman pleading pregnancy, or a person alledging lunacy, or where judgement is to be awarded after sentence against a person who had made his escape, the evidence is taken before the court, and judged of by it; and this cannot be controverted to be the law of Scotland: and therefore, as the prisoner has already been tried, convicted, and attainted by parliament, the court must try the questions that are now started without a jury. Nor is the law in this respect any way altered by the act 7^{mo} Anne, which enacts, That trial for treason shall be the same in Scotland as in England; and that the pains and forfeitures shall be the same: for that we are not now in a trial for treason. The prisoner is already tried, convicted, and attainted by act of parliament; and nothing now remains but to award execution against him: And therefore we are now out of the case provided for by the act of the 7th of the Queen; but in an incidental or collateral question arising after the judgement, in determining which this court ought to follow the law and practice of Scotland. And though, in England, the prisoner's objections why execution should not be awarded against him, would have been tried by a jury, that can have no effect here, as the court is not tied to the forms of England, except in the trial for treason. And it is plain, that, even in England, they do not consider awarding execution to be any part of the trial: for a peer must be tried and condemned by his peers; and yet the court of king's-bench can award execution against a peer, whom they cannot try; which is a demonstration that it is no part of the trial. And further, the method of proceeding in England, in trying such collateral circumstances by jury, shews it is not looked upon as any part of the trial. Thus there is no regular pannel of a jury summoned

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ed and returned, but a jury is immediately called *de circumstantibus*; nor are the usual challenges allowed as in a trial. If all collateral circumstances, with respect to treason, behaved to proceed according to the law and practice of England, the consequence would be terrible to this country, as no person put in custody for treason could have the benefit of the act 1701. But as, both after the rebellion 1715, and the rebellion 1745, numbers of people committed for treason got the benefit of the act 1701, it is a proof, that the law of Scotland takes place in collateral circumstances which do not properly belong to the trial."

Lockhart replied, "That this defence resolves into a very general question, How far a person against whom execution is craved to be awarded upon an attainder for treason, is intitled to have his defence tried by a jury? The prisoner considers the question as of no great importance to him, as he is persuaded he shall have the same justice from the court which he could have expected from a trial by his peers. But, this notwithstanding, he is advised, that, in point of precedent, the question is of the last importance to every man in this island. It has been always justly held, that a trial by a jury is the grand bulwark of the lives and liberties of the subject: but if this bulwark shall once be broke in upon, particularly in matters relating to treason, it is easier to foresee than to prevent the consequences.

And in order that this question may appear in its proper light, it is necessary to observe, that anciently there was no such thing known, neither in the law of England nor in the law of Scotland, as attainders in absence. And though the wisdom of the nation has since found it necessary, particularly in cases of treason, to introduce attainders of absent persons; yet where execution is craved to be awarded upon such attainders, especially where, as in the present case, they are not absolute, but conditional, the law has allowed various defences to the prisoner; such as, 1st, That he is not the person named in the act of attainder; 2^{dly}, That he had fulfilled the condition of the act, by surrendering within the time limited; or, 3^{dly},
That

That it was not in the power of the person attainted to fulfil the condition, as having been hindered by imprisonment, or otherwise.

The present question is, How far a prisoner, pleading all or any of these defences, is intitled to have the same tried by a jury? And here it is admitted on the other side, that, by the law of England, the defences now pled for the prisoner could not be tried otherwise than by a jury; and therefore as, by the act *7^{mo} Annæ*, the law of Scotland, with regard to treason, is totally abolished, and the law of England substituted in its place; and as it is thereby specially provided, that, in all matters of treason, the court of justiciary in Scotland "shall proceed, hear, and determine, in such manner as the " court of queen's-bench may do by the laws of England," it necessarily follows, that the defences now offered for the prisoner must be judged of and determined according to the forms of the law of England; which, as has been already said, can only be by a jury. And that there is no foundation for the distinction made by the prosecutor, between the trial itself, and the questions incidental or collateral to it, is evident, not only from the clause above recited, but also from the narrative of the statute, from which it plainly appears, that the intention of the legislature was, "That the laws which relate to high treason, and the proceedings thereupon," should be the same over the whole island.

And therefore it is unnecessary to enter into a nice discussion, How far the defences competent to be pled for avoiding an attainder, are, in a strict sense, to be considered as parts of the trial of treason? or, How far the person against whom execution is demanded, is intitled to the same challenges against jurors which would have been competent in a trial for high treason? It is sufficient for the prisoner to say, That, by the act *7^{mo} Annæ*, it is plainly intended, "that " all proceedings upon the crime of treason" should be the same over the whole island, and should be regulated by the law of England: and therefore, as it cannot be denied, that every process or defence competent for avoiding an attainder for treason, is a proceeding up-

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on the crime of treason, it necessarily follows, that it must be governed and judged according to the forms of the law of England.

And indeed, as it cannot be disputed, that the intention of the legislature was, that the law of England, with regard to treason, should thereafter take place over the whole island, the prisoner cannot help thinking, that it might justly alarm every man in the island, and more especially the natives of England, if it should be found to be in the power of the prosecutor to deprive them of the most valuable of all privileges, that of being tried by their peers, merely by a piece of address, in laying them under the necessity of pleading their defences before the court of justiciary, instead of the court of king's-bench.

And that there is no foundation for the distinction made between principal and incidental questions, is further confirmed by an act passed in the 22d year of his present Majesty; which, after ascertaining the manner of proceeding to outlawries for high treason in Scotland, provides, "That all defendants outlawed for high treason
" in Scotland, shall, as near as can be, have all such and the like
" methods, remedies, or advantages, for avoiding, falsifying, or
" reversing any such outlawry, as may be had by the law and usage
" of England." Now, as it cannot be denied, that, by the law and usage of England, all defences competent to be pled for avoiding an outlawry, must be tried by jury, it necessarily follows, that in Scotland they must be tried in the same manner. And if it is admitted, that defences competent to be pled for avoiding an outlawry, must be judged of and determined by a jury, it will be difficult to assign any good reason why the same rule ought not to hold where defences are pled for avoiding an attainder; as attainders and outlawries are so far similar, that they are both to be considered as judgements in absence; the first being pronounced by the legislature in parliament, and the last by the ordinary courts of law. And in both cases, the judgement is founded upon a presumption of guilt, arising from the contumacy of the party, in not appearing in the process of outlawry, or in not complying with the condition in the act of attainder.

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It has been said, That it would be attended with terrible consequences, if all collateral circumstances with respect to treason behaved to proceed according to the law of England; and in particular, that, in cases of treason, it would deprive the subject of the benefit of the act 1701, concerning wrongous imprisonment. But, with submission, the answer is obvious. For though it should be admitted, that the consequence of the argument now pleaded, would be to deprive the subject of the benefit of the act 1701, in cases of treason; yet another consequence of the same argument would be, to intitle the subjects of this part of the island to the same securities which the subjects of England have against wrongous imprisonment, which are at least as strong as those given by the act 1701.

From what has been said, therefore, it appears, not only that the defences now offered for the prisoner would have been tried in England by a jury, but also, that in this case the court of justiciary are tied down to follow the forms of the law of England; and therefore it seems to be unnecessary to follow the prosecutor in the arguments drawn from the law of Scotland; of which however no part can be admitted. The general rule of the law of Scotland is, That no man can be convicted of any crime, inferring the loss of life or member, otherwise than by his own confession, or the verdict of an inquest. And as this is as ancient as any part of our written law, so the prisoner is persuaded, the judges will not allow this inestimable privilege to be explained away by imaginary distinctions between principal and incidental questions; a distinction contrary to the genius of our law; and which, if it were once received, might be attended with consequences fatal to the liberties of the subject.

And as to the instances of incidental questions mentioned on the other side, it will be found that they turn the other way. And, 1st, As to the defence of pregnancy, the prisoner is advised, that if the case occurred, it would fall to be tried by a jury of matrons, according to the directions laid down in the two statutes of King Robert II. *cap* 26.; which provide, “That where any woman accused
“ of any crime alledges herself to be with child, that the judge shall
“ cause

“ cause three or more midwives, of good experience and fame, convene together; who, being sworn by their great oath, shall take inspection of her conform to their art; and if all agree, or the maist part of them, that she is with child, that the woman who is accused, shall be committed to sure custody till she is delivered of her child.”

And, in like manner, as to the defence of lunacy, it cannot be doubted, that, by the law of Scotland, it would fall to be tried by a jury. And so it is expressly provided by another statute of the same King, *stat. 2. cap. 23.*; where it is enacted, “ That if any furious person shall slay any man, inquisition shall be taken if that be done be feigned fury or not; and if it be tried that it is committed by them being of their wit and good mind, they shall be punished as men of haill mind and found wit.”

And accordingly Sir James Balfour, in his *Practicks of the law of Scotland*, p. 514. observes, that the defence of furiosity should be tried by an inquest. And if, in any particular instance, it has happened, that this defence has been tried without a jury, the prisoner will be forgiven to say, that it must have proceeded from inadvertency, as the alledgeance of furiosity is not properly an incidental question, but, by the laws of all countries, is admitted to be a relevant defence in all manner of crimes.

And, *lastly*, As to the alledgeance, That where execution is craved to be awarded against a person who had escaped after conviction or sentence, that, by the law of Scotland, the question concerning the identity of the person is tried without a jury, it cannot be admitted by the prisoner: for though in the books of Adjournal there are several instances where execution was awarded without any jury against persons attainted in absence, or who had escaped after sentence; yet it will be found, that in every one of these instances, the prisoner against whom execution was awarded, had either acknowledged that he was the person, or at least had not denied it. And though the prisoner, by reason of the shortness of the time which has been allowed him, cannot condescend upon particular instances

where this defence, concerning the identity of the person, was ever tried by a jury; yet the prosecutor, who has made a full search of the record, will not say, that there is any one instance to be found, where the identity of the person was denied, and the issue notwithstanding tried without a jury.

Upon the whole, as it is admitted by the prosecutor, that, by the law of England, the defences now pled for the prisoner could not have been tried otherwise than by a jury; so it is hoped it has been made out to the conviction of the court, that the present case is to be governed by the rules and principles of the law of England. But supposing it were otherwise, as no instance can be condescended on where ever defences such as these pled for the prisoner, were tried without a jury, the prisoner is persuaded, that the court will not deprive him of that inestimable privilege, which was never before refused to any British subject in the like circumstances."

To this it was replied, "That it is very surprising the counsel for the prisoner should insist, that there is no instance in the books of Adjournal, of execution being awarded against a criminal, who having escaped, and being afterwards apprehended, denied his identity. The case of Johnston the gypsy, in the year 1728, who had been sentenced in a circuit-court at Jedburgh, but had escaped, is a clear instance to the contrary; for in that case he was brought before the court at Edinburgh, and, upon a proof taken of his identity by two witnesses, the former sentence was ordered to be put in execution against him. It is true, the record does not say, that he denied himself to be the identical person: but surely, if he had confessed it, the proof which was taken would have been altogether unnecessary. The procurators for the prisoner have admitted, that there are several instances in the books of Adjournal, where persons who had been sentenced in absence, were, upon being apprehended, and acknowledging their identity, ordered for execution without any jury: which plainly proves the proposition which the prosecutor is now contending for; because in all trials for crimes, if the pannel shall confess, such confession supercedes the necessity of any proof:

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but still the jury must return a verdict; and the confession of the pannel is the only proof transmitted to them. From which it clearly appears, that the proceedings of the court in trials for crimes is by a jury; whereas the court themselves are the only judges of the identity of a person who has been already sentenced, whether that identity is proved by the confession of the party, or by witnesses."

Triplied, "That it appeared from the former part of the argument, that the defences pled for the prisoner fell to be determined by a jury; and that whether the court shall incline to proceed according to the forms of the law of Scotland, or by those of the law of England. And that in the law of Scotland there is no foundation for the distinction made between principal and incidental questions, has been proved beyond dispute, from the authorities referred to with regard to the defences of pregnancy and furiosity, which are both said to be incidental questions. And therefore, supposing that the defences pled for the prisoner were to be considered only as incidental questions, which cannot be admitted; yet even in that view they behoved still to be tried by a jury.

The prosecutor has not attempted to impugn any of the authorities cited for the prisoner, but has been pleased to condescend upon one instance, viz. that of Johnston; where it is pretended, that the question concerning identity, though denied, was tried without a jury. But, in the *first* place, It is submitted, what weight can be laid upon one precedent only, where the question concerning the necessity of a jury was not disputed; and, more especially, where this single precedent, in the case of a gypsy not defended, is contrary to the genius and spirit, not only of the law of Scotland, but also of the law of England, in a case where the subjects of both parts of the island are equally concerned? In a case of such importance, nothing less than a constant tract of decisions can have weight with the court.

2dly, When the case of Johnston is considered, it is truly no precedent: for there it does not appear that the prisoner had ever denied that he was the person convicted; and therefore, by the law of Scotland as well as England, there was no necessity for a jury, that be-

ing only necessary by the laws of both countries where a relevant defence is offered by the prisoner, and issue joined upon such defence. And it is of no importance, that in that case two witnesses were examined for proving the identity; for as the record does not bear, that the prisoner denied the identity, the legal presumption is, that he had made no defence; and that the two witnesses were only adduced and examined *ob majorem cautelam*. But the examination of these witnesses will never prove, that the prisoner had denied the identity; for if that had been the case, the forms of the court made it necessary to enter the defence in the record; and as no such defence is entered, it must be presumed it was not made.

The prosecutor still insists, That in the books of Adjournal there are several instances, where persons escaping after conviction, being afterwards apprehended, and acknowledging the identity, have been ordered for execution without any jury. But no argument can be drawn from the case of a party confessing, to the case of a party denying. The purpose of juries is only to judge of defences made by the party accused; and therefore, as a party who confesses judicially, makes no defence, he may be lawfully condemned without a jury. This clearly appears from the 64th act, parl. 8. James III.; which provides, "That assizers who are suspect *de temerario juramento*, shall be accused before the King and his justice; and if they confess their fault and *temerarium perjurium*, they are to be punished after the form of the old laws; and if they deny, the King and his council shall give them an great assize."

Quadrupled, "That the doctrine laid down in the triply, wherein it is maintained, That, by the laws both of England and Scotland, there is no necessity for a jury, except in the cases of defences offered, and issue joined, is, according to the law of Scotland, without all manner of foundation. And the act of parliament referred to, has no concern in the matter, as it must be admitted, and is certain in point of fact, that scarce any instance whatever is in the books of Adjournal, of a person upon an indictment confessing his guilt in presence of the court, that ever the court proceeded to condemnation without

without remitting such person to an assize. And the sentence always uniformly runs, Upon consideration had of the verdict, the Lords, in respect of it, by which it is found proven so and so, either decern and adjudge the pannel to be executed to the death, or afoillzie. And though a single instance or two may be found a hundred years ago, where the court did proceed to sentence on a confession, without remitting to a jury; yet it was always upon the person's own consent. And the uniform practice, since the present constitution of the court in 1672, is, in all trials, whether the person accused confess or not, for them to proceed by jury, as said is. And many instances occur, where persons tried and convict in absence for treason, before the high court of justiciary, have been, upon their being apprehended, ordered for execution; some of them persons of the highest rank in this kingdom, such as the Earl of Argyle, &c. And nothing more was done there, but the court satisfying themselves, without any jury, as to the identity; which was either acknowledged, or not denied: and is truly similar to the present case; which is by no means a trial, but only the bringing evidence of a fact concerning the prisoner, that of his being the same person attainted by the act."

The interlocutor was as follows. *March 11. 1754.* "Find, That
"there is sufficient evidence before the court, of the foresaid act of
"parliament of the 19th year of his present Majesty, from the sta-
"tute-book, and exemplification of the said act therein contained,
"produced; and repel the objection made thereto. As also repel the
"exception pled for the said Archibald Macdonald, That his name
"is *Macdonnell*, in place of *Macdonald*; and that exception alleged
"by him, of his father's name being *Macdonnell of Inverie*. And be-
"fore answer to the other defence pled for him, of his surrender,
"they ordain him and his procurators to give in a more special con-
"descendence, of time and place, and way and manner of his sur-
"render, and submitting himself to justice; and the person to
"whom, and the evidence of such person being a justice of peace,
"and an acting one, to whom he so surrendered; as also to conde-
"scend on the witnesses by whom he is to prove the same; and to
"give

"give in such condescendence, and that to the clerk of court, against to-morrow at four o'clock in the afternoon: And find no necessity for proceeding in this matter by a jury: And supercede further procedure in this affair till Wednesday next at ten o'clock in the forenoon."

The prisoner gave in a condescendence, March 12.; which was objected to by the crown-lawyers: and the court, March 13. found it insufficient, and refused a proof of it.

Afterwards the prisoner admitted the identity: the crown lawyers, however, proved it by witnesses: and the court, March 22. 1754. ordered his execution in the way and manner usual in such cases. But it was prevented by a reprieve; and he was afterwards pardoned. — See below, under the case of Murdieson and Millar in 1773.

Alt. Solicitor Home, et alii.

Alt. Lockhart, Geo. Brown.

N^o 64.

July 1754.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

ISABEL KILGOUR.

Child-murder. — Error in clerking a verdict may be corrected before the jury is dismissed.

SHE was indicted for murdering her own bastard child in March 1753, by putting it in a sand-bank on the links [downs] of Leith; which occasioned its death.

The jury, July 22. 1754. unanimously found her guilty.

July 23. 1754. "After reading over, and before sealing up the above verdict, the clerk having observed, and notified to the court, that there was an error and omission in transcribing the names of the fifteen assizers, on the top of the paper on which the verdict

"was

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“ was wrote, in so far as *Thomas Inglis wright* was designed upholsterer in place of *wright*, and the name of *George Lawson upholsterer*, one of the fifteen, entirely omitted; the Lords called upon and interrogate the haill fifteen affizers, who were all present; and they severally declaring, that the said George Lawson, one of the affizers, was present alongst with the rest when their verdict was argued and agreed to, and subscribed by their chancellor and clerk; and that the said mistakes were entirely owing to the inaccuracy of their clerk, the same were thereupon ordered to be amended; and were accordingly instantly amended, before sealing up of the verdict, by John Macglashan clerk to the jury, in face of judgement; and the verdict thereafter sealed up.”
The court sentenced her to be whipped, and banished for life.

At. Haldane, Cockburn,

Alt. Macintosh, Rae.

Nº 65.

December 9. 1754.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

GEORGE JOHNSTON, a Cadie in Edinburgh, and Andrew Mafon, a fervant.

Hamesucken. — Battery. — Libel restricted. — Arbitrary punishment.

THEY were indicted for hamesucken and a most inhumane battery, committed upon Betty Gordon, spouse to George Waters; and it was particularly charged, That they, in resentment for her having discovered to the constables some disorderly houses, had, in October last, forcibly entered George Connellie's house in the Canongate, in which she staid, lying and rising nightly and daily, broke open the door of the room in which she was a-bed, pulled her out of a press in which she had hid herself on hearing them force into the house, dragged her naked by the hair of the head, first into the

the kitchen, and then into the streets, where they threw her into a kennel, beat her with their fists and sticks, and thrust a stick, &c.

It was pleaded in defence, There was no such person as the one to whom this injury is said to have been done. Betty Gordon is not the wife of Serjeant Waters, but married to one Pitcairn. Hame-fucken is not to be extended, and could not be charged in this case, the house entered being a public house, and a bawdy-house; and the door was not broke open, the landlord himself opened it. The person said to be injured could have no legal domicile, whether she be reckoned married to Waters or Pitcairn, separate from her husband. She could have no legal domicile within the liberties of Edinburgh, because she had been banished therefrom as an infamous prostitute. An occasional residence does not constitute a domicile; and therefore lying and rising in a house for some time not sufficient to make a domicile in such a question. Betty Gordon can be considered in no other light than as a servant to Connellie, residing with him, in order to procure gain for him by the prostitution of her body.

Ans. Betty Gordon had resided for several months in Connellie's house, under the character of Waters's wife; which was sufficient to support the indictment, as it was impossible for the Advocate to know accurately the designation of such persons; nor did the panels alledge that there was any other Betty Gordon residing in Connellie's house at the time libelled. As to the other objections, every person's house was, by the law of this country, reckoned his sanctuary: and it was improper to talk of a legal domicile; for in such a case as this, the domicile was not *juris*, but *facti*. It was not necessary to constitute this crime, that the door should be broke open: it was sufficient, if the people within were compelled by threats to give admittance. — See Macgregor's case, N^o 60.

The court repelled the objection as to Betty Gordon *per expressum*; and without taking notice of the rest, found the libel relevant, &c.

After the jury was set, the Advocate restricted the libel to an arbitrary

bitrary punishment; upon which the pannels confessed the crimes libelled; and the jury brought them in guilty.

The court sentenced them to be whipped through the city of Edinburgh, and at Connellie's door in the Canongate, and to be banished to the plantations for life.

Adv. Macqueen.

Att. Lockhart, Ch. Hamilton-Gordon.

N^o 66.

1755.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

NICOL BROWN, Butcher in Edinburgh.

Murder. — Special verdict. — Capital sentence.

THIS man was indicted for the murder of Janet Caldwell, his wife. The *species facti* charged against him, in substance, was, That he had frequently beat and maltreated her; on which occasions she had been heard to cry, *Murder!* and shew the marks of his blows on her body to the neighbours: That on the 13th November 1755, he had threatened to beat her, because she would not give him some rings she wore; and on that night he forcibly held her to the grate in his own house; by which her cloaths taking fire, she was so horribly scorched, in her belly, breast, and other parts of her body, that she died next day: That while he was perpetrating this crime, the neighbours hearing her cry, *Murder! Murder!* or, *God forgive you, Nicol Brown, I am burnt!* or words to that purpose, came to rescue her; and finding the door shut, knocked loudly; and that on this a candle, which was seen in one of the windows, disappeared for some time, and her shrieks ceased; and in about ten or fifteen minutes he opened the door, calling out for help, or, for God's sake to bring water, for his wife was burnt; and the neighbours rushing in, found her lying on the floor grievously burnt,

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and none in the house but him and her; and that upon their asking how the affair happened, she answered, That the murdering dog her husband had thrown her into the fire.

The prisoner did not dispute the relevancy; that was unquestionable; but he set forth in point of fact, That he came home early the night the affair happened, and soon after went to bed, leaving his wife sitting in the room with a lighted candle: That when he went to bed, he threw off his shirt, according to his usual custom; and having fallen asleep, he was awaked by her shrieks; when starting out of his bed, he found her standing in the middle of the floor all in flames: That without waiting to put any thing upon him, he flew to her assistance, and endeavoured to extinguish the flames, first with his hands, and next, when she fell to the ground, by treading on her burning cloaths with his naked feet; whereby both his hands and feet were miserably scorched: That as he could not leave her in that condition, so soon as the flame had subsided he ran to the street quite naked, calling upon the neighbourhood for assistance; who, upon their coming into the house, found both him and her in the forefaid miserable condition. Further, he offered to prove, That his wife was an habitual drinker; and though he could not say that she appeared to be drunk when he went to bed, yet as there were spirits in the house, it was presumeable she had made too free with them after he went to bed; and being thereby intoxicated, may casually have set fire to her cloaths. — Lastly, he offered to prove, That, upon former occasions, when in liquor, she had fallen into the fire, and burnt herself grievously; nay, that her behaviour after this accident happened, when the neighbourhood came in, would be proved to be such as had the strongest appearance of her being in liquor that night.

The libel was found relevant, and the prisoner allowed to prove all facts and circumstances, in common form.

The jury brought in the following verdict: " They all in one voice find it proven, At the time and place libelled, that Janet Caldwell, spouse

spouse to Nicol Brown, the pannel, was burnt, of which burning she died the next day: And further find it proven, That there was no person in Nicol Brown's house but her and the pannel Nicol Brown, her husband, when the said burning happened; and that the neighbourhood being alarmed with her dreadful cries of murder, ran to the pannel's house, and knocked loudly; but did get no admittance for about the space of a quarter of an hour; and upon their entering the pannel's house, found the said Janet Caldwell lying in the floor of the room in a most miserable condition."

Counsel being heard upon the import of this verdict, informations were ordered, and prepared.

It was argued for the crown, That the circumstances found proved by the jury, were sufficient upon which to found judgement of death. And this will appear still more clearly upon looking into the proof, which, it was maintained, the court might do, so far as it is explanatory of the circumstances taken notice of in the verdict; in proof of which position, the case of Livingston [N^o 55.] was referred to; and the argument for the crown, in that case, upon this point, was repeated: but it was admitted, that such parts of the proof as related to circumstances not taken notice of by the verdict, must be for ever buried in oblivion. It was said, however, in the narrative of the information, that all the particulars libelled, with several others, had been proved.

In corroboration and explanation of the circumstances of the verdict, it was alledged, That it appeared from the proof the prisoner had been a bad husband, and often maltreated his wife, so as to oblige her to cry out *Murder*! That she often complained to her neighbours of maltreatment by her husband, and showed them the marks of his blows on her body: That immediately after the knocking, a candle was seen moving through the house; and that after it ceased moving, the cries of the deceased were heard no more: That all the cloaths she had upon her were a shift and petticoat, the burning of which could occasion but little flame; so that it might easily have been quenched:

quenched: and it was alledged the prisoner had brought no evidence of the facts stated for him in exculpation.

From all this it was inferred, that there was sufficient presumptive evidence of the murder. Menochius holds, that if a wife be found lying dead by her husband, apparently suffocated, he should be presumed the murderer, unless there be reason to believe the suffocation proceeded from too great a quantity of meat, or some other cause. And Julius Clarus also puts this case, "*Si uxor reperiatur mortua mane, quæ sero erat sana, ex quibusdam percussionibus sibi illatis, an præsumatur a marito interfecta, cum ea cubante, nullis in camera aut domo præter eum existentibus, si prius ab eodem male tractabatur?*" And the worst consequences would ensue, if such circumstances as are here found were not deemed sufficient to infer guilt, seeing it may often happen, that one of two persons living in the same house together, may be murdered by the other, and yet it be impossible to get more evidence than what is contained in this verdict; especially if the crime be perpetrated by suffocating or burning, which make it the more credible that accident may have occasioned the death.

This court has often inflicted a capital punishment in consequence of special verdicts; Thomson's case, Nov. 10. 1707; the Master of Burleigh's case, 1709, &c. Sometimes the court has mitigated the punishment on account of circumstances; as in Livingston's case, and others. Sometimes the court, when a different crime was found proved on that charge, has inflicted an arbitrary punishment. Thus in the case of Colonel Charteris, tried for a rape, in 1723, the jury having found it proved, that he was seen lying above the prosecutor's wife; and that while they were on the ground together, she was heard to cry out; the court decreed the Colonel to pay the prosecutor L. 300 Sterling for damages and expences.

Special verdicts have been long in use with us: there are many instances of them from 1671; and though such verdicts are hypothetical in England, finding the prisoner guilty or not guilty if such and such facts infer so and so, yet there is no instance of a special verdict

verdict so conceived in this country. And the practice of forms in England cannot be resorted to, to found an objection to the verdict in question, as the English ideas are quite different from ours in matters of this kind. Besides, it is well known, that many offenders escape by *unseemly niceties*. And this Lord Hales laments in his *Pleas of the Crown*, vol. 2. p. 193. The case *Rex contra Plummer* does not apply; for all the verdict found was, that one of eight persons fired the gun which killed Harden: but this did not tally with or come up to the charge. At the same time, this case affords an instance of an English special verdict that was not hypothetical.

It was argued for the pannel, That the burning, in this case, might have been accidental; and that as there was a possibility of his being innocent, he ought to be acquitted. — But it is answered, That the whole circumstances of the case exclude the notion of accident; and that there would never be a conviction upon circumstantial evidence, if a possibility of innocence was a sufficient defence; for however long and well connected a chain of presumptions may be, still that possibility must subsist.

The information for the prisoner argued, That anciently, over all Britain, both civil and criminal causes were tried by juries: and though in civil causes in Scotland, that mode of trial has been long abandoned, yet it still takes place as to crimes; of which no subject can be found guilty, but by a verdict of his peers*: and anciently, it behoved juries to find in general guilty or not; at least it was so in England till the statute of Westminster 2. which allowed special verdicts. But these have been always hypothetical, finding the pannel *guilty or not*, according as the court shall judge the facts found proved sufficient to infer guilt or otherwise. This is agreeable to the principle of law in both countries, that no man can be found guilty but by the verdict of his peers; and therefore it is doubtful, whether the verdict in question be good, as it does not find the prisoner guilty of any crime, and refers nothing to the judgement of the court.

* This is too generally expressed. — See the case of Black and Gillespie in part 2.

Be this as it may, it is clear by the law of both countries, that when once a verdict is returned, the court must proceed, not upon the *evidence* which was the foundation of the *verdict*, but upon the *verdict* itself; because, as Lord Hales expresses it, vol. 2. p. 313. "it is the conscience of the jury that must pronounce the prisoner guilty or not." And he adds, That if the opinion of the court were to rule the matter of fact, trials by juries would be useless. And this holds particularly in special verdicts; for when the jury finds certain facts only proved, the law presumes they had reason to disregard the proof as to other particulars: and therefore the court, in judging of the verdict, ought to disregard all facts not contained in it. And this, too, is so strictly adhered to in England, that no defect in the verdict can be supplied by argument or implication. And this is not a nicety, but a consequence of this most important principle, That the jury are the only *competent judges of the fact*; Keyling's Reports, p. 109. — In the cases of the Master of Burleigh and Livingston, the facts in the verdict were sufficient to infer guilt, and would have been found to be so in England; Hale, vol. 2. p. 302.

The present question is, Whether the facts in the verdict are sufficient to infer the crime charged? If the court shall think so, the prisoner does not dispute, that they may proceed to the last punishment. Neither does he dispute, that crimes may be proved by circumstances; or maintain, that each circumstance by itself must be conclusive: but what he contends is, That the result of the whole must be certain and conclusive, leaving no room to doubt of guilt.

The circumstances in this verdict are not such: The burning might have happened by accident in many ways; and it would be ridiculous to presume, that the prisoner had set fire to his wife, because he happened to be alone with her in the house when she was burnt. Not many months ago, the mistress of a house, in the street where that of the prisoner stands, being in liquor, and finding it difficult to untie the string of her head-dress, set a candle to it; upon which her cloaths immediately took fire; and though her husband, and a maid-servant, were in the house, it is notorious she

was

was scorched to death before the flame could be extinguished. It is *possible* the prisoner's wife may have been burnt in the same way: And were he to go into the proof, as the prosecutor has most improperly done, he would say it was not only *possible*, but *highly probable*.

The facts in this verdict might all have happened *naturally*, without any guilt on the part of the prisoner.—It was *natural* for his wife, when she found herself on fire, to alarm the neighbourhood; and the cry of *Murder* was the most proper for that purpose.—It might *naturally* happen, that the neighbours did not get admittance immediately upon their knocking at his door; for he might have been asleep, it being then between the hours of ten and eleven at night: and supposing him to be awake, it was his duty not to leave his wife till he had first endeavoured to extinguish the flames.—As to the space of time intervening betwixt the knocking at the door and the opening it, the libel is not precise; and as the neighbours would doubtless be impatient to learn the cause of the shrieks they heard, they naturally would imagine, that they were kept out longer than they really were.

The facts in the verdict, therefore, are clearly insufficient to infer the crime charged. The passage from Menochius does not apply; for it supposes the body of the wife to bear apparent signs of suffocation. Besides, if the whole passage had been transcribed, it would have appeared, that the author only thought the circumstances the prosecutor has quoted, were sufficient, when joined with others, to infer guilt. As to the case from Clarus, it supposes, *1st*, That the wife, who was well at night, had been found dead in the morning; *2^{dly}*, That there were marks of strokes on her body; *3^{dly}*, That she had been formerly maltreated by the husband: And, after all, the author gives no opinion, but only says, another author thinks these circumstances sufficient for putting the husband to the torture.

Hitherto the prisoner has argued upon the verdict; and the prosecutor should only have done so too; but he has most improperly introduced the whole proof into his memorial; and, what is worse, misrepresented

misrepresented it. How can it be said, that all the circumstances libelled were proved, when no proof was attempted of the most material, viz. "That the pannel had forcibly held the defunct to a grate or chimney till her cloaths took fire?"

Some witnesses have said, that they heard the deceased complain of her husband, and show blemishes from his blows on her body.— But it is clear from the proof, that she, for many years before her death, had been a most notorious drunkard, and in the practice of abusing her husband.

Only one witness mentions any thing of a quarrel betwixt the prisoner and his wife on the day of the accident; but all she says is, that the defunct said there had been a quarrel.

The indictment alledged, That the defunct had accused the prisoner as guilty of murdering her; and three witnesses, companions of the defunct, have deposed so: but one of them ought to be disregarded; because she denies her having heard of the defunct's drinking; for that cannot be true. Further, a man who asked the defunct, what had occasioned the burning, has deposed she answered, She knew nothing of the matter. Lastly, All the three witnesses who depose, that the defunct accused the prisoner, agree, that she did so in the presence of two surgeon-lads; but the only surgeon-lad who was examined, deposes, That when he asked the defunct how she came by the misfortune, she made no answer.

As to the circumstance of a light having been seen moving in the house, it is trifling: it might have been occasioned by the defunct's removing from one place to another while on fire. It is only sworn to by two witnesses; whose evidence is disproved under the preceding article. One of these says, the light first appeared at the window from whence the shrieks came, and was afterwards removed to another further north. But it is in proof there is no other further north in the house.

The circumstance of the deceased having no cloaths on when burnt, but a shift and petticoat, makes for the prisoner. It is not easy to say what effects their burning might have; but no man in his senses would

would have chosen to perpetrate this crime with so few combustibles.

There are several circumstances in proof which strongly fortify the legal presumption of the prisoner's innocence. *1st*, All the witnesses agree, That the prisoner's hands and feet were burnt.—This is real evidence, that between the knocking at and opening the door, he had been employed in extinguishing the flames. *2dly*, The deceased, after the accident, so far from having any resentment against the prisoner, conversed with him in a friendly manner, and sent frequent messages during the night, inquiring how he was, and expressing her concern for the misfortune he had met with.

Such was the substance of the argument on each side. The case was not without difficulty. The court, however, *in respect of the verdict*, adjudged the prisoner to be hanged in chains; and he was executed accordingly.—He asserted his innocence to the very last.

Att. Alex. Home, et alii.

Att. Geo. Brown, et alii.

N. B. As so much has been said in this case on accidental burning, it may perhaps not be improper to observe, that several persons have been burnt to death, not by *external* fire, there being none in the rooms where they perished, but by *internal*, arising from the excessive use of spirituous liquors, and other causes.—See *Philosoph. Transact. Abridg.* vol. 10. p. 1073, 4, 6.

N^o 67.

July and August 1757.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JOHN SIMPSON and John Ramage Constables, Stephen Dunford and Edmund Jones Soldiers.

Officers of the law may with impunity kill a man whom they have a legal warrant to apprehend, if he resist them with a mortal weapon.

THE charge in the indictment against the prisoners, in substance, was, That, upon the 3d April 1757, being employed as constables to execute a warrant granted by the justices of the peace of Haddingtonshire, for apprehending the person of George Wood, they went to his house in Tranent; and that then and there the said George Wood was, by a shot from a firelock, feloniously murdered, or bereaved of his life; and that the pannels were guilty, actors, or art and part of the said murder.

The constables pleaded, That having gone into Wood's house, in order to apprehend him, in virtue of a warrant from the justices, authorised by a late act for recruiting his Majesty's forces, they knocked at his door, informed him of their errand, and desired him to deliver himself up. To which he answered, That he would open the door, and was going for the key: but in a little after they heard him say, That he would drive them to heaven or hell; and forthwith he discharged a gun, the shot of which made a great hole in the door; so that if any of the party had been standing opposite to it, he must have been killed: That upon this two of the soldiers loaded their pieces, and fired in through the door; and though no aim was or could be taken, one of the shots took place, and Wood was killed: — That they denied they had given orders to the soldiers to fire; and though they had, the expression imported, and could be construed to import, no more, than that the soldiers should discharge their

their pieces, in order to frighten this desperate fellow; but not to kill, or fire into the house.—They insisted, the libel was not relevant, *1st*, because no premeditated malice or forethought felony was libelled; *2dly*, because they were acting in execution of a legal warrant, and had been resisted with mortal weapons; which circumstance made this a case of self-defence, they being *in periculo constituti*.

The soldiers pleaded, That they had been raised out of their beds to assist the constables; and gave the same account as to Wood's behaviour the constables did; and argued, as they did, That they had no premeditated malice against the deceased; and that they were justifiable for firing, because it was in self-defence, and in support of the constables, whom they were ordered to assist in executing a lawful warrant.

Answered, It is not necessary to libel, that the intention to kill was premeditated of a long time; it is sufficient, that intention *antecedit ictum, licet non congressum*; and in this case the fire was not returned upon Wood immediately, but some space of time intervened; which shows the slaughter was not *done of a sudden*: but though it had, it would not avail; because the act 1661 does not exempt such slaughter from capital punishment.—Although an officer who has a warrant against a felon, may kill him if he resists, or even flies; as on no account ought such a person be allowed to escape, and the purpose of apprehending him is in a great measure effectuated by putting him to death: yet an officer cannot lawfully do so in execution of warrants granted in civil cases, or even for trespasses, unless his own life be in danger. It would be unjust to kill on such occasions; and doing so would defeat, not execute, the warrant; Hale, Hawkins. And in this case it was not necessary to kill Wood in order to save the lives of any of the party, as there was nothing to have hindered them to retire; and they might have prevented his escape by barricading the door; Case of Beith in 1672, and Frazer in 1674.

Replied for the prisoners, The act 1661 was not meant to repeal the ancient law with regard to slaughter *done of a sudden*. In many

cases, for the greater security of the subject, or the removing doubts, statutes have passed, without meaning to imply an alteration of the former law as to particulars not taken notice of in these statutes. However, this case falls under the exception of homicide in lawful defence, which is expressly mentioned in the act 1661.—The prisoners could not retreat without manifest hazard, and just ground to fear, that this outrageous man would again fire upon them from the windows, or sally from the door.—Had he fired upon them in the open fields, it cannot be disputed, if he remained upon the spot, and in a posture to proceed to further violence, they might have been justified for shooting at him. Now surely there is more danger from an enemy who lurks in a strong-hold, and offers violence by surprise, than from him who encounters in the open fields.—It may be very true, that an officer cannot kill a man who does no more than fly from the execution of a warrant for a civil cause, or for a trespass; but if he resists, and especially if he defends himself with weapons, all lawyers agree, that he may be lawfully slain; Matheus, p. 484.; Hale, vol. 1. p. 481.; Hawkins, vol. 1. p. 71. And there would be an end to justice, if, upon resistance, its officers were obliged to stop, and not allowed to take every method to enforce the law.—The two cases quoted for the prosecutors do not apply; for in both the homicide was committed in execution of what was not sufficiently warranted: but the following cases are clear for the prisoners; that of Hunt 1711; that of Macadam and Long 1735, [N^o 43.]; and that of Serjeant Burtch in July 1748, [N^o 54.]

The court found the libel relevant; and allowed the prisoners to prove all facts and circumstances, &c.

The jury, Aug. 12. 1757, brought them in not guilty; upon which they were dismissed from the bar.

Att. Crown-lawyers.

Att. Hamilton-Gordon, Garden.

Jan. 1758.

The KING against ROBINSON.

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N^o 68.

January 1758.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

Lieutenant THOMAS ROBINSON of the Train of Artillery.

Excusable homicide.

THE indictment against Lieutenant Robinson charged, That he having conceived a causeless resentment or ill-will against the deceased Robert Ewar, late lieutenant in the train of artillery, he did, on the 2d December 1757, within the borough of Perth, attack and insult the said Robert Ewar, by twisting his nose; and upon the said Robert Ewar's endeavouring to defend himself against such violence, the pannel attacked him with a sword, or other deadly weapon, with which he wounded him in the body; of which wound the said Robert Ewar died in about an hour, or some short space thereafter, and thereby was cruelly murdered: At least, &c.

It was set forth for the pannel in point of fact, That in summer last, the pannel and the deceased joined their corps, then lying at Perth: They were both very young, nearly of the same age, not much exceeding nineteen: In their dispositions they were greatly different; the pannel was studious, applying himself to mathematics, and such other branches of science as became a gentleman and a foldier; the deceased, on the contrary, was dissipated, and addicted to idleness and pleasure.

The pannel was of a mild and gentle temper; the deceased was turbulent, petulant, and quarrelsome. From dispositions so opposite in persons constantly residing together, it was natural to suppose that differences and disgust would ensue. The deceased, upon many occasions, sought to quarrel with the pannel, treated him with the utmost contempt, repeatedly reviled him in expressions of the severest, most unprovoked, and most unjustifiable abuse. When the
pannel

pannel chanced to spill some water on the deceased's bureau, the deceased swore, *That one of them should leave his bones in Perth*: he frequently termed the pannel a *scoundrel, rascal, and no gentleman*; and, not to give more instances of this unhappy turn of mind, on the morning of that day which was the last of his life, he openly, in a court-martial, called the pannel a *scoundrel*, and threatened to knock him down.

The pannel declined every occasion of quarrel with the deceased; when provoked and challenged by him, he overcame the prejudices incident to soldiers; he esteemed it more honourable to decline coming to extremities, than to vindicate himself in that method which the mistaken notions of mankind seem, in some sort, to authorise.

It will particularly be remembered, that the pannel was much superior to the deceased in stature as well as in strength. This would have given him too fatal an advantage over his antagonist; and this advantage he would not use, even when provoked in the highest degree.

No methods of forbearance could correct the unhappy temper of the deceased: his behaviour on the day libelled too evidently proved, that his passions remained undisciplined to the last. On the morning of that unhappy day, Lieutenant Hill of the artillery was, with the pannel and the deceased, ordered by the commanding officer to hold a court-martial. Mr Hill, as the senior officer, presided; the pannel, as next in command, had a title to sit on his right hand; the deceased took this place, which belonged to the pannel; nor would he quit it, till the opinion of Major Cleveland, the commanding officer, had been received, adjudging that place to the pannel. The deceased, on quitting his place, called the pannel a *scoundrel*, and threatened to knock him down. To this the pannel, though highly provoked, made no answer.

They proceeded to business, and the court-martial was held. After the court broke up, the pannel, in company with Lieutenant Hill and the deceased, went into a room in the barracks. He took no notice of what had passed at the court-martial; he had no inten-

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tion of taking any notice of it; unarmed he sat down to write. He happened to say, That the deceased had broke a chair in the room. This circumstance was trivial, though true. The deceased, with his usual impetuosity of temper, swore that he had not broke the chair: the pannel repeated his assertion. On this the deceased, with much passion, and many oaths, started from his chair, and addressing himself to the pannel, said, *You are a scoundrel, rascal, and no gentleman; and I will expose you to all the gentlemen of the battalion.* It may be true, that the pannel, after having received such usage, twisted the deceased's nose. The deceased snatched up a pocker, and aimed a blow at the pannel; who parried it with his arm: the deceased let fall the pocker, and clapped his right hand to his sword, and was in the act of drawing it. The pannel being thus in imminent danger of his life, wholly unarmed and defenceless, retired a few steps: he chanced to perceive a sword on a bureau in the room; he drew it in order to defend himself; the deceased rushed upon him furiously, wounded him dangerously in the head; the sword which the pannel held in his hand pierced the body of the deceased; the wound was mortal.

The counsel for the pannel, denying the libel, pleaded in point of law, 1st, That he ought not to be found guilty of murder; because he had no malicious intention to kill, which is essential to this crime.

Answered, Such intention is essential; but it is sufficient, *si antecedit ictum, licet non congressum*. The pannel, therefore, to make his defence relevant, must prove, that when he gave the mortal wound to the deceased, he had no intention of giving such mortal wound. 2^{dly}, A malicious intention being an act of the mind, can only be gathered from circumstances. If the pannel wounded the deceased with a sword, or other deadly weapon, the intention will be held malicious from the weapon used.

Defence 2. If Lieutenant Ewar was killed by the sword which the pannel held in his hand, yet the pannel ought not to be found guilty of

of murder; because Lieutenant Ewar rushed furiously against the pannel, and run himself upon the sword.

Ans. 1st, This assertion is very improbable. The deceased was run through by the sword. Now he who so rushes upon a sword, as to force it quite through his body, must not only have an uncommon strength, but a determined resolution to put an end to his own life. Yet the deceased is acknowledged not to have had the strength of an ordinary man, nor is there the least probability of his having intended to be his own murderer. 2^{dly}, It will be proved, the sword entered at a place higher than that at which it came out. This shows the deceased did not run upon the sword: for if he had, as he was lower in stature than the pannel, he must have raised up its point, and consequently it must have come out at a place higher than that at which it entered. 3^{dly}, If it be proved, that the pannel drew the sword, advanced towards the deceased, and was once engaged with him, it will nothing avail the pannel, to show, by minute circumstances, that the mortal wound might have been occasioned by the impetuosity or unskilfulness of his antagonist.

Def. 3. If the pannel made a thrust at the deceased, he did it in self-defence.

Ans. Self-defence in the abstract is a relevant plea: but it is not so qualified in this particular case as to be relevant. He who pleads this defence, must subsume, in the 1st place, That he was the person attacked; Mackenzie, Duels, § 6.; Exculpation, § 2. 2^{dly}, That he was *in periculo vitæ constitutus*; so that the only alternative remaining for him was, that of being killed, or killing the aggressor. But neither of these requisites appear in the pannel's case. For, 1st, He was the aggressor, by twisting the nose of the deceased. That was the first real injury, and the occasion of all that afterwards happened: and if it shall be further proved, that the pannel drew, and advanced towards the deceased, incontestible evidence must arise of his being the aggressor. 2^{dly}, The pannel has not specified circumstances sufficient for proving, that no other alternative was left him but that of killing or being killed. He was unarmed. Now

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it cannot be supposed, that the deceased, however petulant and quarrelsome, would have murdered an unarmed man. In the first motions of his resentment, when his nose was twisted, he did not draw his sword. It may be true he clapped his hand to the hilt; but this motion could not endanger the life of the pannel: but it was probably nothing more than an expression of resentment, or it might be construed into a challenge to fight; but in no light can it be considered as an assault. And supposing the pannel had apprehended an assault, yet still he exceeded the *moderamen inculpate tutelæ*. He might have gone out of the room in less time than he must have taken in going to the bureau, laying hold of the sword, drawing it, and standing to his defence, or advancing against the deceased. He might have retired with less danger than, according to his own plea, he was exposed to, by remaining in the room. Self-preservation must have suggested such a retreat. It was expedient, and in no sort dishonourable. He chose to remain in the room, and did the deed for which he is now arraigned.

Cases quoted for the pannel; that of Andrew Rutherford, 1664; Macmillan in 1690; Captain Price same year; Govan 1710; Maclean same year. [See N^o 21.]

Cases for the prosecutor; that of Agnes Bain in 1693; Cuming, 1695, [N^o 10.]; Ross and Roberts, 1716; Brook and Lindsay, 1717.

The court found the libel relevant, and allowed the pannel to prove all facts and circumstances, &c.

The jury, Jan. 17. 1758, found him not guilty; on which he was dismissed from the bar.

Att. Sir D. Dalrymple, et alii.

Att. Miller, W. Stewart,

N^o 69.

July 25. 1758.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JAMES FORBES, Chaplain and Schoolmaster to the Charity Workhouse of Dalkeith.

Virginis immaturæ contrectatio.—Stuprum.—Raptus.

THE indictment set forth, "That where, by the laws of God, and the laws of this and other well-governed realms, the seducing and debauching the minds of young girls to lewd, indecent, and vitious practices and behaviour, by putting hands up their petticoats upon their privy parts, and otherwise using them in an indecent manner, is a crime of a heinous nature, and severely punishable; And whereas also, by the laws of God, &c. the committing a rape upon, or ravishing by force, and having carnal knowledge of a girl under twelve years of age, or the decoying girls under twelve years of age to a private place, and there having carnal knowledge of them, though with their consent, are both and each of them crimes of a heinous nature, and severely punishable;" and the indictment charges, as an aggravation of all these crimes, especially when committed by a person intrusted with their education: Yet true it is, that he had been guilty, actor, art and part, of all and each of the foresaid crimes, aggravated as aforesaid; in so far as, &c.; and then it charges a variety of libidinous acts in 1758, and also several rapes, and his having carnal knowledge of a girl under twelve years of age.

It was pleaded in defence, That no law had pointed out lewdness as an object of public vengeance: That a rape could not, in the sense of law, be committed on a girl under twelve years of age; because by law she is incapable of consent, and can have no will; and it is a *presumptio juris et de jure*, that there cannot be copulation with

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with a girl under twelve; *l. 25. ff. De inj. l. 9. ff. De spons.* So that there might be a battery, but could not be a rape here. The debauching a girl under twelve is not more criminal than debauching a woman arrived at maturity; and by the law of France, and other countries, it was punished as simple *stuprum*.

The libel was found relevant to infer the pains of law, allowing the pannel to prove, &c.

The Lord Advocate upon this declared, "In respect it is known
"to him, that the evidence of the rape and carnal copulation will
"be proven only by girls under age, he therefore, in this cir-
"cumstantiate case, agrees to restrict, and hereby restricts, the said
"indictment, and interlocutor thereon, to an arbitrary punishment;
"and in the present case, insists only upon the said indictment a-
"gainst the pannel to that effect."

The jury, July 24. 1758, by a plurality of voices found him guilty. He was sentenced to be whipped, and banished.

Adv. Ro. Dundas Adv.

Alt. Geo. Wallace, Crosby.

N^o 70.

August 1758.

JOHN WIGHTMAN of Maulsley, with concurrence of his Majesty's Advocate,

A G A I N S T

ROBERT MONTGOMERY, Lord Provost of Edinburgh, Alexander Miln, corporal, and eight sentinels, belonging to the city-guard of Edinburgh.

A party of the town-guard of Edinburgh may with impunity enter a gentleman's house there, and carry him and his company, in an ignominious manner, to the guard-house, upon a verbal order from a magistrate, given, because some of the company, who were drunk, had made a great noise, and talked obscenely from the windows, so as to gather a mob, on the sabbath-day.

THE charge against the soldiers was, That they had violently broke into the prosecutor's house on the afternoon of Sunday the 4th June 1758, when he, with some of his companions, was solemnizing the Prince of Wales's birth-day with innocent mirth and festivity, and without the least noise or disturbance: That after they had in this manner entered, they, without the least provocation on the part of the prosecutor, upon being only civilly asked, what warrant or authority they had for entering his house, first cut him on the head with a Lochaber axe, and then knocked him down; and while he was in this condition, dragged him out of his house, with two of his companions, and carried him through a croud of people, without his hat or wig, the blood streaming from his head, to the guard-house, in open day-light, pulling him along by the cravat, which they twisted about his neck, and which, if it had not broke, must inevitably have strangled him; while others were striking and pushing him up behind with their guns and Lochaber axes. Nor did their barbarity stop here: for after they had dragged

dragged him to the guard-house like a malefactor, they there, while he was their prisoner, still without any provocation on his part, knocked him down twice, by repeated blows given by many at the same time with guns and Lochaber axes; and after all this, threw him into the thieves-hole, or dungeon, where he remained for some hours.

The charge against Mr Montgomery, who was Provost at the time libelled, imported, That all this violence and outrage was committed by his order; or at least, that he was so far guilty, art and part therein, that though not personally present when the said violence was committed, yet, without any proper information, signed or unsigned, and without any just cause, he sent a verbal order to the guard, commanding them to repair to the prosecutor's house, and to make him and all his company prisoners; or that, while in the knowledge that the said soldiers of the city-guard were thus illegally employed, he did not interpose for the relief of the prosecutor and his companions, but suffered the soldiers to proceed in their outrage, thereby encouraging and countenancing their illegal doings: and further, that he did so far ratify and approve what they had done, that upon the following day he caused form a criminal libel, before the magistrates, at the instance of their procurator-fiscal, against the prosecutor and his companions, for various acts of riot, and profanation of the Lord's day, and for assaulting and beating the guard, when endeavouring to suppress that riot; and that when the complaint was presented to the magistrates, the said Lord Provost did take upon him to sit and act as a judge along with them.

It was pleaded for Miln and the other soldiers, That they had acted by lawful authority, having an order from the Provost; that they had not committed the excesses libelled, nor done any more than was necessary to carry the order into execution, the prosecutor and his friends having violently resisted and attacked them.

It was set forth for the Provost, in point of fact, That when sitting in a room in the most retired part of his house, having heard a confused noise, he stepped into another room, the windows of which
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are towards Forrester's wynd, from whence the noise proceeded; and there observing a confluence of people, he was informed by one of his servants, that there was, and had been for a considerable time, a great tumult and disturbance in a house in the neighbourhood, by people fighting, cursing, swearing, singing idle songs, vomiting over the window, and calling out the most obscene language to women who were passing, which was the occasion of the people assembling, and did give great offence to all who heard it; that he, without knowing who was the possessor of the house, did send the said servant with a message to the guard, desiring, that a corporal and six soldiers might be sent to see what the matter was; and this he did, and does, consider to have been his duty as a magistrate of Edinburgh.

In point of fact, it was answered for the prosecutor, That whatever pains had been taken here and elsewhere to represent the prosecutor as a contemner of religion, and profaner of the sabbath, he was conscious to himself the imputation was unjust; nor had any thing happened in his house on the day libelled that could give any countenance to the accusation, as he was not to blame for the only circumstance that could give the least offence, which was this. Two of the gentlemen he had invited to dine with him on the day libelled, which was the birthday of the Prince of Wales, had supped freely and been late up the preceding night, which made them be soon heated with the moderate quantity of liquor they got from him after dinner, and one of them having grown sick, went to a window that stood open to ease his stomach, unobserved by the rest of the company. Some female from a window in the opposite side of the wynd, with more zeal and indiscretion than good manners and prudence, addressed him in words to the following purpose: "Up with it, my lad; you have had enough to your Prince's health." To which he made an answer not very decent: but the conference proceeded no further; for his speaking having engaged the attention of the company, he was taken from the window, and it shut down; and the prosecutor thinking it improper to have a drunk man among sober persons,
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sent for a chair, which carried him home. The other flustered gentleman was far from being in an humour to commit any disturbance: the company were in the prosecutor's bedchamber, and this gentleman being disposed to sleep, put off his shoes, and lay down upon the bed, where he continued till awakened by the town-guard, whose behaviour would be proved to be as stated in the libel.

After hearing a long argument on the relevancy of the libel, and defences, the court ordered informations.

The information for the prosecutor argued, That in this country there has been a succession of salutary constitutions, which, from very small beginnings, have grown up to, and do now compose, a complete and well-regulated system of liberty. The claim of right in 1688 is the great charter of liberty to the inhabitants of this part of the island; and the statute 1701 is the *Habeas corpus* act of this country. The first declares, That *the imprisonment of persons, without expressing the cause, is contrary to law*: and the last enacts, That no person shall be imprisoned without a warrant of commitment in writing, expressing the cause of imprisonment, and proceeding upon a signed information; otherwise it shall be understood as an unlawful imprisonment, and shall subject the judge or magistrate in the pains and penalties expressed in the statute. Without the essentials therefore of a signed information, and a signed warrant of commitment, no man can be apprehended for a supposed crime; and whoever imprisons him otherwise, is guilty of a breach of the statute, and may be prosecuted in terms thereof, or at common law, upon the claim of right. This prosecution is founded upon the common law, and not upon the act 1701, which passed in affirmation of the common law, and inflicts a penalty, that may be sued for before the civil court, rather as damages to the person unjustly imprisoned, than as a punishment to the judge or magistrate who shall violate the liberty of the subject.

The charge against the Provost was founded, 1st, Upon the order for committing this insult, the countenance, approbation, and permission, which he gave when it was committing, which constitute him

him a principal in the crime : and, *2dly*, The ratification, approbation, support, and protection, which he afforded to the persons actually guilty, and the steps which he took against the prosecutor after it was committed, fix upon him the most open and culpable accession that can well be conceived.

As to the orders, the Provost has admitted, that he gave them; but he contended, that it was his duty to do so as a magistrate of Edinburgh.

That it is the duty of every magistrate to inquire into the cause of every disturbance, and quell it by lawful means, is most certainly true : but it is equally true, that to take information of a loose and uncertain nature, when positive might have easily been had ; to send a servant with a message, not so much as put into writing, for a body of armed men, in a time of public tranquillity, in the chief city of a kingdom which composes a part of Great Britain, was a rash, an unadvised, and a criminal step. — The Provost says, This party was sent to see what was the matter ; but the servant-maid sent for them would have been much more properly employed for that purpose. If the Provost was to depend upon the authority of a servant-maid, he ought at least to have given her an opportunity of being well informed herself.

But the sending a party of armed men was altogether improper. The constables have right by law to quell all disturbances ; and if riots are committed within doors, may enter the house, and quell them ; and if they be invaded and obstructed in the discharge of their duty, they may call upon the town-guard, or any other of the lieges, to assist them. The constables, therefore, were the only proper persons to send, had there been a riot. But it was altogether illegal and oppressive to let loose a parcel of soldiers into a gentleman's house, without a peace-officer, or any person of discretion, along with them, to moderate their barbarity.

The Provost has not alledged, that he himself heard or saw any of the irregularities which are pretended to have been committed by the prosecutor or his friends, but only, that he saw a confluence of
people

people in the wynd, and was told by his maid, the disturbance proceeded from the prosecutor's house; and this he took for granted, though, if there had been really any such disturbance, he must have heard and seen it as well as she; for he was in the same room with her, the windows of which were opposite to the prosecutor's. If he says the disturbance was over before he came into that room, his conduct is rendered the more inexcusable; for whatever right he might have to send a proper person to inquire into the disturbance while it lasted, he could have none to do so after it was over.

With respect to the second part of the charge against the Provost, viz. his approbation, countenance, and permission thereof:

Supposing he had, upon proper information of a riot, given a legal warrant to the officers of the law to quell it, and imprison the authors of it; yet if, in execution of these orders, a riot or excess was committed, they are all equally culpable as if no such orders had been given: for it is trite law, that a riot may be committed in the execution of justice: and if a judge or magistrate, knowing of such excess, shall not interpose his authority, and prevent it, he is equally culpable with those who commit it; for if it is his duty to prevent breaches of the law by others who are not immediately under his command, it is much more so to prevent such transgressions in those who are.

Nor is it any defence to say, That he did not interpose in this case, because he was not informed of any excess by the party; but how soon he understood the prosecutor and his friends were committed, he ordered them to be set at liberty.

For it will be remembered, that the Provost of Edinburgh is by his office Colonel or commander of the city-guard, and it was by his orders that a party was employed on this occasion to carry the prosecutor and his friends to prison; for that the order went so far, is plain from the party dividing, and besetting the house on both sides, which must have been done to prevent any one from escaping. The Provost had heard a disturbance; he had seen a great confluence of people; he believed the prosecutor and his company to be riotous

and drunk; he well knew the violent and barbarous temper of the town-guard, which has been the subject of universal complaint in this city for several years past; he therefore had all the reason in the world to expect a squabble, and much greater disturbance than what had happened; and therefore it was surely his duty to inquire how matters were going on; and his neglecting to do so was criminal; for negligence in office is a point of dittay, and a crime, both by the common and statute law of this country, *Ærodius, tit. De officio præfecti vigilum*, and act 1457, *anent punishing of negligent officers*. Accordingly Provost Wilson was punished by act of parliament, solely for *omission, and neglect of duty*; and the causes expressed in the act do not surmise any positive transgression on his part; but merely want of proper care and vigilance. And in Provost Stewart's case, the sum of the different articles of charge against him amounted to no more than culpable omission and neglect; upon which the court had no difficulty to sustain a relevancy. And many general officers in the navy and army have been severely punished for no worse crime. The reason is, that neglect in office is a breach of the trust reposed by the commonwealth in the person who holds it, which depends not only upon his integrity, but upon his activity and diligence. And in so far are public officers in a worse situation than the rest of mankind. Others are not understood to commit a crime, unless the deed was done intentionally; but the very want of intention is criminal in public officers. Vigilance and activity are required of them; and the want of either, through defect of judgement or personal indolence, is severely punishable. Nor can they complain; for no man ought to undertake an office, without laying his account with the consequences of neglect of duties incumbent on him in it.

Lastly, The Provost's ratification of the outrage, and the protection he afforded those who committed it, do not only afford an article of indictment by themselves, but evidence of all the rest of the charge; for it will show the whole was done by his order, consent, and allowance. Had the case been otherwise; had he been, as he pretends, sorry for the violence of his party; he would not next day have
ordered

ordered the procurator-fiscal, his servant, to frame a scurrilous and scandalous libel against the prosecutor and his friends, and exhibit the same before the magistrates, of whom he was the chief, and himself sit in judgement on this complaint, contrary to the usual practice, and tried to precipitate it, in order to prejudge the question now before this court. Instead of endeavouring to screen and protect the offenders by various methods, he, as commander of the city-guard, and chief magistrate, ought to have punished them. Had he done so, the prosecutor would have been convinced, that the Provost was only culpable for a gross neglect; and that he probably would have pardoned; but a contrary conduct produced a contrary conviction.

By the law of Scotland, the ratification of a crime, either by protecting the criminal, or by other acts, is an accession to the crime: for accession may be given, antecedent to the fact, by counsel and advice; concomitant with it, by help and assistance; and posterior to it, by ratification and protection. This last is in our law-language called *ratihabition*; and in that of England, the person affording it is denominated an *accessary after the fact*. The relevancy of this needs no aid of authority to support it; and, upon the whole, when all the circumstances of the case are considered, it is impossible to doubt the Provost's having given the *orders* to commit this crime, having *permitted it* when committing, and *ratified it* when done.

As to the soldiers, whose defence has been rested upon the Provost's order, the prosecutor answers, That there is no law by which even a regular and formal order under the sign-manual of a magistrate, can authorise a party of *soldiers*, unattended with a peace-officer, to enter the house of any of his Majesty's subjects; and the town-guard *are soldiers*, not peace-officers. If they have been in the practice of entering people's houses, it was perfectly illegal: but it is believed they have been in no such practice; and that even in the suppression of bawdy-houses, which seems the most material part of their duty, they are commonly attended with a constable, to restrain their barbarity and insolence.

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However, all this is foreign to the case: for if the sending, in an abrupt manner, a dozen of fellows, with arms in their hands, and most of them even ignorant of the language of this city, (such as it is), into the house of any gentlemen, with a discretionary power to do what they think fit, be not contrary to law and liberty, law and liberty are but names.

Supposing the emergency of the case had required, and that they could have been endued with lawful authority to enter the prosecutor's house; yet no excuse or apology can be offered for their beating, wounding, and dragging him from his house, and hauling him through the streets, exposed to the gaping multitude, without hat and wig, wounded, and bleeding, &c. Though their alledgeance, that they had been first attacked by him and his friends, were as true as it is false; it would not avail; for it was justifiable to resist them; especially considering the treatment the prosecutor and his friends met with. Be it supposed, that they were drunk, the less danger did the party run from them; and it was the more inexcusable to maltreat any gentleman in that situation. Where is the man that can say to himself, it has not been at some time or other his own case? Let the reflection of what has or might have happened to every man, determine his judgement upon this point.

It was argued in the information for the soldiers, No malice or ill-will on the part of the pannels against the prosecutor and his friends is alledged; the tale, therefore, told by the prosecutor is very improbable, and the libel irrelevant.

The libel charges three particulars: 1st, The entering into the house; 2^{dly}, The seizing and carrying Mr Wightman and his company to the guard; and; 3^{dly}, The riot and outrages committed upon them in his house, on the street, and in the guard-house. The two first of these are clearly irrelevant, as it is admitted, the pannels had a verbal order from the Provost, their Colonel, which they were bound to obey. It is only the last part of the charge which is relevant, and peculiar to the soldiers; and, on that account, the Provost has very properly separated his cause from theirs.

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The fact, so far as respects this article of the indictment, is as follows. Mr Wightman and some of his friends, on the day libelled, were indulging themselves in a practice which has of late prevailed but too much in this country, viz. the practice of drinking to excess after dinner, "a custom unknown to our forefathers, and that never was practised in any civilized country in the world, not even in such where drinking was the fashionable pleasure. The polite Romans, after Asiatic wealth had introduced Asiatic manners among them, when they had a mind to make merry, and indulge their genius, chose the night as the proper season. They would break a little off the day, as they expressed it; that is, they would take a small part off it from the business and duties of life, and give it to mirth and jollity; or, in other words, they would make an early supper: but the debauch never came till the soberer part of men were retired to their homes or beds; so that the public could not be offended with any thing immoral or unbecoming that the licentiousness of wine might produce.

This was the decorum observed by men of learned luxury in ancient times, and even by the *good fellows* of this country, till that unbounded love of pleasure, and general dissolution of manners, that is advancing so fast upon us, had made drinking and rioting all day, as well as night, fashionable. This decency of manners is preserved even by poets and painters in their fictions. The rites of Comus do not begin till *the tell-tale Sun has gone to bed*. Sir John Brute, and his company, in the comedy, do not sally forth to beat the watch, and insult the constables, till night; and the horrid scene of drunkenness represented by Hogarth is a *midnight-entertainment*.

The fact, however, was, That Mr Wightman and his companions were, on the 4th June last, revelling about four or five in the afternoon, and celebrating those orgies in the face of the sun, which night and darkness ought to have concealed; and this, too, on Sunday; a day that is still held sacred by a very great majority, as it is hoped, of the inhabitants of this metropolis. Nor will it be deemed a small aggravation of this public offence, that the name of a virtuous young

young prince is used to patronize such indecent riot on so improper a day. By the time that the people were returning from their several places of public worship, the debauch was become high; and the tumult of drunken mirth so loud, that the whole neighbourhood was alarmed. They were hooping, hallowing, howling, singing obscene songs, cursing, swearing, leaping, tumbling, and sometimes squabbling and fighting; insomuch that some of the soberer among them called out of the window for the guard. One of them was so far gone as to ease his stomach at the window, and expose his shame to the public street. So much noise and disorder would naturally draw a great concourse of people about the house, especially at this time of day, on a Sunday, when the streets are usually crowded by people returning home from public worship. But the revellers now being gone above all shame, scrupled not to show themselves at the window, and to entertain the female part of the spectators with the most filthy and obscene language. All this passed almost under the eye of the chief magistrate, whose house is just in the neighbourhood; and who, hearing the noise, and being informed by one of his servants, that there was a great tumult and disorder in some house in the neighbourhood, did, according to the duty of his office, as he apprehended, send for a party of the guard, to see what was the matter. Accordingly Corporal Miln, and six other soldiers of the city-guard, were dispatched from the guard-house. When they came, they were directed by the mob to the house from whence the disorder proceeded. Upon entering this house, *they found all quiet for the present*; for, as it appeared afterwards, some of the most noisy and tumultuous of those bacchanals had been quite overcome by the liquor, and *fallen asleep*, or gone to bed. The corporal found no body in the lower story but a maid, who appeared to be as drunk as those who made the disturbance. Being able to learn nothing distinctly from her, he went to the upper story, where he found Mr Wightman sitting, and drinking with the remains of his company, that yet retained at least the faculty of swallowing more. Mr Wightman, who was soberer by much than any of his guests, and could

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yet speak with some degree of understanding, upon being asked by the corporal, whether it was in his house the disturbance had been? assured him there was none; and desired that he might get out of his house. Upon this the corporal was going away very civilly, supposing, that possibly he might be *in a mistake* as to the house; but, however, as he had been directed to this house by all the people without doors, and observing in the family and the company visible marks of disorder, he thought proper to recommend, before he went away, to Mr Wightman, that if there had been no disorder hitherto, there might be none. While he was giving him this injunction, and just parting with him, out bounced two of the rioters, who, it seems, had fallen in the battle, and, as it appeared from their dress, had been put to bed: immediately, without any previous expostulation, or any thing like the appearance of reason, they fell upon the soldiers with all the rage and fury of frantic bacchanals; beating them with hands and feet, throatling them, and endeavouring to wrest out of their hands the Lochaber axes. What could the pannels do in such a case? They had not the lyre of Orpheus; and if they had had it, it would not have availed them any more than it did Orpheus; who, though he could tame wild beasts, and soften even rocks by his music, yet could not appease the rage of that mad bacchanalian rout that tore him to pieces. In such an extremity, if they had used, in their own defence, the arms that were in their hands, they could not have been blamed; but the fact is, that not a blow was struck by them; only the corporal, seeing now very clearly that he was not mistaken as to the house, and that he had found the persons who had made the disturbance, thought it was his duty not to bear so daring an insult, though from drunk men, but to secure them, and carry them to the guard. He therefore ordered his men to apprehend them; and to prevent any danger from the Lochaber axes they had in their hands, which they might have been provoked to use indiscreetly, he took the axes from them, and carried them himself. While this was a-doing, Mr Wightman interposed, and, with terrible curses and imprecations, swore, that no man should be carried.

ried out of his house to the guard. But the corporal insisting that they should go, Mr Wightman swore, that if they went, he would go along with them. The corporal said, that they had nothing to do with him, but only with them who had made the disturbance, and beat and insulted the guard: they therefore desired that he would keep his own house. But he still insisting that he would accompany his friends, fastened upon them; and notwithstanding all the corporal could do, went with them to the guard: but no dragging by the cravat, no pushing up behind with muskets, of which there was not one in the company, nor with Lochaber axes, which were all carried by the corporal, who marched before."

As to what passed in the guard-house, the fact is, that Mr Wightman, and "his two friends, from whom he could not be separated, were put into that room in the guard-house next to the Captain's room, in which gentlemen-prisoners commonly are put, and not in that worst place which is commonly made the prison for whores and thieves, and is supposed to be the place that is meant by what is called the *dungeon* in the indictment; and there they remained till they were liberated, without so much as one blow exchanged betwixt them and the soldiers in the guard, or any the least disturbance, except their cursing, swearing, and threatening, as drunk men commonly do."

The reflections thrown out against the city-guard are groundless. It was established by law very properly; because, though in the country, or in villages, the ordinary officers of justice will be able to execute the law, yet it is not so in great cities. In these it becomes necessary to have a kind of standing army, who can overcome resistance, if offered; or, what is better, prevent it by the terror of their appearance. The town-guard of Edinburgh are a kind of armed peace-officers, who are under the command of the magistrates, and ready, upon every occasion, to protect the lives and fortunes of the citizens upon any sudden emergency, when the interposition of the law, and its civil officers, would be too late; and they have in fact been often of great use, both to the whole city, and to many individuals:

viduals; for which reason, when an attempt was made after the affair of Porteous, to take away this guard, it was opposed and defeated.

The information for the Provost argued, That no evil intention, no *dolus*, no wilful purpose or wrong, is charged in the indictment against him; yet an evil purpose is an essential ingredient in every indictment, and especially in accusations against judges for trespasses in their duty. It is not sufficient in an indictment against them, to charge an act as wrong, which may be the matter of debate or review, and the subject of different opinions, before superior judges. But to make it a criminal act, it must be charged, that the judge *wilfully* committed wrong. Thus the act 17. parl. 6. James II. intituled "Of punishment of officers transgressing in their offices *wilfully*," declares, "That if any officer *wilfully* transgress in his ministration "of his office of the law, he shall be punished," &c. And in the case of Provost Stewart, the interlocutor of this court found it relevant "to infer the pains of law, That the pannel, at the time and "place libelled, being then Lord Provost of Edinburgh, *wilfully* "neglected to pursue, or *wilfully* opposed or obstructed, when proposed by others, such measures as were proper or necessary for the "defence of the city against the rebels," &c. For want, therefore, of this material ingredient, the charge is irrelevant, as well as incredible.

If the watch or guard, whose business it is to suppress disorders and riots, commit an outrage or excess, they no doubt ought to be punished; but the person who called them, confessedly with an innocent intention, should not be arraigned. If a company of drunk men had come along the streets, singing and rioting upon the sabbath, the guard would have seized them, without an order from a magistrate; or if such a disturbance had happened in any house near to the guard, and the mob had gathered about it, if no magistrate was at hand to give any order, the officer of the guard would have been justified in entering the house to compose the riot; and if he and his party were insulted and assaulted, they might have carried the rioters to the guard, to prevent *farther mischief*, until the orders

of a magistrate were got. Such is the practice in this, and every other great city. And though it should be admitted, that the Provost gave a verbal order to carry the prosecutor and his company to the guard, the circumstances of the case made it his duty to do so. To disturb a sober neighbourhood with a noisy riot and debauch, is an offence that ought to be restrained at any time; but to behave as the prosecutor and his company did upon the sabbath-day, and in the very neighbourhood of the supreme magistrate, in the capital city of a kingdom, distinguished and applauded for its religious observance of the sabbath, was a scandalous offence of itself, and a high indignity done to that magistrate.

The fourth commandment of the divine law is, "Remember the sabbath-day to keep it holy;" and sacred writ has pronounced the most dreadful threatenings against those who profane it; Nehemiah xiii. 17. 18.; Isaiah lviii. 13. 14. It is but too evident, that in this great city, a reverence for the Lord's day is greatly abated; and some very bad practices have been loudly said to have been committed in times of divine worship, but committed in private. Here they have been done in the most public and scandalous manner.

Justices of peace, and magistrates of boroughs especially, have a power of summary commitment by parole-warrant, and without any formal information, upon occasion of such riots or disturbances. Before the act 1701, for protecting the liberty of the subject from oppressive or wrongous imprisonment, the magistrate's power of imprisonment was under no restraint, but what arose from his own discretion. By that law, a most proper limitation is prescribed to the power of magistrates, and a general rule is established; by which commitments must proceed upon written informations or warrants, containing expressly the cause of the imprisonment: But among other exceptions from the general rule, this is expressly mentioned: "Without prejudice to inferior judges and magistrates to imprison, in order to trial, for indignities done to the said judges and magistrates; or to imprison for riots, bloods, and batteries, or persons

“ sons found acting in tumults, or for drunkenness, *sabbath-breaking*, and swearing.”

That such parole-warrants are allowed and practised in our neighbouring country, appears from Hawkins, b. 2. c. 13. § 14.; where he appeals to other authorities. In London, it is notoriously known, that the constables and watchmen have general powers and instructions, without special warrant from any magistrate, to take up such riotous offenders against the peace of a neighbourhood; and every day, the finest bucks of them all are sent to the round-house, and often get their heads broken, when they chuse to be heroic, and fight with those hardy officers of the peace; though, no doubt, in London, if any watchman, or officer of the peace, was to commit an outrage or excess in the execution of his duty, he would be punished for it. It is believed, that if a company of wild companions should presume to set up such a drunken rout upon Sunday hard by the Lord Mayor's house, to the offence and disturbance of himself and all the neighbourhood; without any scruple, or inquiry who they might be, he would send a party of tipstiffs to carry them to the round-house; and every good citizen, however much a lover of mirth and chearfulness, would think it a strange and alarming thing indeed, if his Lordship was indicted as a criminal for so doing. The office of our Lord Provost in this city ought to be treated with equal reverence and respect, and will be as dear to every good citizen.

The clamour against the town-guard, in this case, is perfectly groundless. They were established soon after the Revolution, and granted to this city as a reward for its zeal and service at that period. By their institution, they are made entirely subservient to the power of the civil magistrate. By the first regulation, they must find security for their honest and good deportment; and their duty, respecting such cases as the present, is expressed in the 19th regulation: “ That the captain of the guard take particular care to keep the peace, by suppressing all *riots, tumults, and other disturbances*, and “ by *seizing* the transgressors, whose names shall be given in every “ morning to the bailie in waiting.” And it is impossible seriously

to maintain, that the guard cannot be employed in this duty without the presence of a peace-officer. The civil magistrate may direct the execution of his warrants to any of the people without distinction. It is the proper duty of the guard to act as the watchmen of this city; and they are constantly employed to execute warrants for suppressing disturbances and keeping the peace. In the course of the parliamentary inquiry concerning the conduct of Provost Wilson, in the affair of Porteous, all the evidences confirmed, that this guard had always been of the greatest consequence for the safety and peace of the town; and the warmest testimonies were given in its favour by the late John Duke of Argyle, and the late Lord President Forbes.

It has been said, That the Provost was guilty of neglect, in not inquiring, before he gave the verbal order, who the persons were that made the disturbance.—But to this it is answered, That the truth of the matter is, from the external aspect of the house, and the disturbances committed by those within it, the Provost, with reason, concluded, that the persons offending against all the rules of religion, and even of good manners, were of no great note. And tho' he had known who they were, was he therefore to forbear acting as his duty directed? Firmness and equality in judgement, without respect of persons, is nobly taught and enjoined by the highest authority; Levit. xix. 15.; Deut. i. 17. Had he overlooked the complaints of the multitude, and connived at this public profanation of the sabbath in his neighbourhood, the charge of neglect might have been laid against him with justice. And very bad consequences probably would have ensued, if he had been so remiss. Had a party of the Seceders * [separatists] who were actually coming about this time from their public worship, caught the flame of zealous indignation against these rioters, (and surely nothing could be more apt to provoke it), what mischiefs might not have followed? Provost Wilson

* They retain all the wild notions and doctrines of the rigid Presbyterians in the last century.

was punished by act of parliament, (for it was thought that neglect of duty, where it did not manifestly appear to be wilful, could not be reached by the common law), because he slighted an information which he had received, that a dangerous mob was intended to be raised; and shall this Provost be punished at common law for neglect, because he took the most effectual method to suppress a scandalous riot, which he saw with his own eyes, and to prevent the dangerous consequences of it? He has the good fortune to be above all suspicion warmly affected to his Majesty's family and government: neither is it consistent with any part of his character, to lay rigid restraints upon innocent mirth; but he must confess, that such extravagant follies of riot and debauchery, upon the sabbath-day, appeared to him to be offences against the laws of the land, not justifiable under pretences of demonstrations of joy upon any occasion. The legislature, sensible that rejoicings are improper on the sabbath, has provided, that even his Majesty's birth-day, when it happens on a Sunday, shall not be celebrated till the Monday following.

It is alledged, the Provost countenanced and encouraged the soldiers to commit the outrages complained of. But no one fact is particularised from which this incredible accusation can be inferred. It is indeed said, he was in the knowledge of the excesses committed by the soldiers, and did not interpose. But the falsity of this alledgeance is proved by another part of the indictment, which admits, that he was not personally present when these outrages were committed. And it is charged as a criminal matter (*perhaps with good reason*, if it be literally true) against the soldiers, that they would not give the gentlemen leave to write a letter, and make their complaint to the Provost: And surely it will not be seriously urged, that a chief magistrate must personally attend, or be answerable, for the excesses committed by his officers.

Aiding, abetting, or being *accessory* to a crime, is the proper language of the law; which has a determined sense, and may be inferred from various acts and circumstances in different cases: but that one gave *countenance* and *encouragement* to a crime, and that too when

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not present when it was committed; and when he had no call to be present, is as extraordinary in the language of our criminal law, as it is absurd in the reason and nature of the thing. Indeed it is of importance, that such vague and indefinite words should not be introduced into our criminal indictments; which ought not to be raised, especially against magistrates, excepting where the criminal matter will admit of proper legal terms, the import and sense of which is known and authorized. So vague a charge, conveyed in new-invented terms, upon which the law, or the judges, have fixed no determined meaning, leaves a party accused, and his counsel, in the dark what to make of his accusation, or how to defend him against the consequences of it.

As to the charge, That the Provost approved and ratified the injuries done by the guard, which is inferred from his causing a libel to be raised against the prosecutor and his friends for a riot on the sabbath-day; what connection has his ordering such a prosecution with his approving of the outrages said to have been committed by the guard? Is the magistrate who commits any person for an offence, thereby disqualified from taking trial of it? or does the prosecutor rather mean to be a champion for licentiousness, and pass for a *Hampden among the bucks*? Are cursing, swearing, &c. innocent practices, and not destructive to society? Should the laws against such disorders be repealed, or not executed? And, worst of all, shall an attempt to suppress them by a legal prosecution, be sustained as an article of an indictment against a magistrate?

The Advocate, Dec. 27. 1758, as procurator for Mr Wightman, consented, that the diet should be deserted against the Provost. Upon which the court deserted it *simpliciter* against him, and dismissed him from the bar; and continued the diet against the other pannels.

The court, Jan. 8. 1759, pronounced the following interlocutor on the relevancy: "Find the libel relevant to infer the pains of law against the said pannels, or any of them; in so far as it charges, That they, or any of them, after having entered the prosecutor's house, in consequence of orders libelled to have been given by Robert Montgomery,

gomery, Esq; late Lord Provost of Edinburgh, commanding a party of the guard to repair to the prosecutor's house, to search for, seize, and apprehend him, and all those who should be found in company with him in said house, and commit them prisoners to the said guard, did, without any just cause, abuse and maltreat the prosecutor, or those in company with him, in the way and manner libelled, either in the prosecutor's house, or in the street, or in the guard-room; or that they, or any, or one or other of them, were guilty, actors art and part, in the foresaid facts found relevant; but allow the pannels to prove," &c.

The jury, "by a majority of voices, find, That Alexander Miln, corporal, commanding officer of the party, is guilty art and part in abusing and maltreating the prosecutor, and some of those in company with him, by not allowing Mr Wightman to write to the Provost, by refusing the use of chairs when asked, and by the ignominious way and manner of carrying them, in broad day-light, through the streets, from the house of Mr Wightman to the guard, one or other of them, without hats, wigs, or shoes: and do find the whole other pannels not guilty."

The counsel for Miln moved to be heard on the import of this verdict; and the counsel for the private complainer agreeing thereto, the court delayed advising the verdict till the 22d.

Counsel were heard accordingly; and the court, Jan. 22. 1759, "in respect of the said verdict, assoilzie the said Alexander Miln pannel *simpliciter*, and dismiss him from the bar."

Adv. Hew Dalrymple, Lockhart, Ro. Dundas, *Adv. et alii.*
Garden; for the soldiers, Burnet.

For the Provost;

There is no minute of debate or pleading in the record; which is somewhat surprising, as the court has often ordered minutes, and even informations, upon questions less important and less doubtful than this. There seems, with submission, to be reason for thinking, that *some* punishment should have been inflicted on Miln, in consequence of the verdict against him; the rather, that it is admitted in
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the information for him, that there was no disturbance in Mr Wightman's house when he entered it, but all quiet: so that it is evident, Mr Wightman, and his company, were exposed to the multitude, and imprisoned, not to quell a subsisting disturbance, but because two drunk gentlemen had struck at the town-guard; for which the apparent impropriety of the entry, and their drunkenness, was no bad excuse. It is asked, What could the soldiers do when attacked? The answer is obvious. Eight armed soldiers had such a superiority over three gentlemen, that they might have done what they pleased. In fact they did do so. What they ought to have done was, to have disregarded the impotent attack of the drunk gentlemen, and gone about their business. Besides, what apology can be made for refusing to allow Mr Wightman to write to the Provost? what for refusing chairs, and hauling them, in the condition they were in, along the street? The jury justly held both to be criminal: and it will be observed, the first is in effect admitted to be so, even in the *pious* information for the Provost.

N. B. There is a deal of altercation in the papers about a precognition taken by the magistrates relative to this affair; but the court took no notice of it, and it was not material to the cause.—In the information for the Provost, it is averred, that the Lord Advocate declared, he had given his concurrence in this case officially, and appeared for the prosecutor as a private counsel. The same information likewise takes notice, that tho' the counsel for the prosecutor had, at the hearing, represented the Provost's servant as a *favourite maid*; yet, in the paper for him, all insinuations on that topic had been dropped; and with reason, she being in reality an old woman.

March 1761.

The KING against HEATLY.

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N^o 71.

March 3. 1761.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JANET HEATLY.

Child-Murder.

SHE was indicted on the act 1690; and it was particularly charged, That she had been delivered on the 7th January of a living child, come to the full time, which she had bereaved of life, by an immediate act of violence, or throwing it into a tank or ditch, full of water, where it perished.

The court assigned the prisoner counsel, found the libel relevant, and allowed her to prove, &c.

It appeared from the depositions, and her own declaration, That soon after her delivery, she confessed to some old women, she had born a child, and thrown it into a neighbouring ditch; but denied she had done it any violence: That these women found it there with one of its arms raised a little above the water; but that they observed no marks of violence upon it, saving some blood about its mouth, and upon the stone on which it was lying. No physician or surgeon was called to inspect the body.

She failed in an attempt to prove, that she had revealed her being with child during her pregnancy; so that she was clearly within the statute: and the Advocate, in charging the jury, laid great stress on the circumstance of the child's arm being above the water, as affording evidence, that it had been once alive, and put to death by violence.

It was argued for the prisoner, That it had always been reckoned hard, to convict one in her unfortunate situation, merely upon the statutory presumption; and for many years, a proof of actual vio-

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lence had been required *: That there was no proof of violence in this case, but direct evidence to the contrary by the depositions of the women, who all agreed, that they perceived no marks of it upon the body: and as to the circumstances of the blood and the arm, these might be accounted for in many different ways consistently with her innocence: That if men of skill had been called to inspect the body, as they should have been, they could have determined, with absolute certainty, whether or not the child had ever been alive, by putting its lungs into a vessel full of water: if it had never breathed, the lungs would have sunk to the bottom; if it ever had, they would have swam on the surface †. As this had not been done, and all those who did see the body concurred in deposing there were no marks of violence upon it, the jury ought to acquit her.

The jury, however, found her guilty; upon which she was adjudged to be hanged; and was executed accordingly.—She all along denied she had done any violence to the child; and affirmed it was still-born.

Att. Advoc. et alii.

Att. MacLaurin, et alii.

* In the information for Troublecock, [No 35.] it is said of this act, "That it is a hardy and dangerous law, upon which, it is generally believed, more innocent persons have died than ever did upon any statute." There is, however, a statute to the same purpose both in France and in England; and in 1678, Fountainhall wished for such an one in this country.

† The experiment above mentioned had not hitherto been attended to; but afterwards, in the instructions to the sheriffs, they were ordered to cause persons of skill make it whenever such a case occurred.

July 1763.

The KING against RONALD.

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N^o 72.

July 1763.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JANET RONALD.

Adjournment after the jury has been sworn, and charged with the prisoner, annuls the subsequent procedure and verdict.—Proper method in such case is to discharge the jury, and try the prisoner af new.

AT the circuit-court held at Perth in May 1763, this woman was brought to trial, at the instance of his Majesty's Advocate, for an attempt to poison Margaret Ronald, her sister, by mixing with her food verdigrease, or some other poisonous drug, which threw her into violent vomitings; but of which, by the use of medicine, she recovered on the same day on which she was taken ill.

The advocate-depute, though he contended, that even an attempt to poison is a capital crime; yet, on account of some favourable circumstances, he was pleased to restrict the libel to an arbitrary punishment.

The prisoner pleaded, Not guilty; and put herself upon her country. A jury was sworn and set, and the witnesses were examined in their presence.

After the evidence was concluded, while the advocate-depute was addressing the jury upon the import of it, David Melvill, one of the jurymen, was suddenly seized with a violent convulsion, which rendered him for some time quite senseless; and though he was immediately blooded, and every thing done for his recovery, it was to no purpose, and it became necessary that he should be carried out of court. The judges, after waiting a considerable time, and taking the report of the surgeon who attended him, were satisfied there was no hopes of his recovering so much as to be able that day to perform the remaining part of his duty; the court therefore adjourned till

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next

next day at nine o'clock. Before they did so, they asked the prisoner, whether she would consent to it? which she declined.

Mr Melvill having recovered, and the whole jury returned into court next day, as directed by the interlocutor, the advocate-depute moved, That the trial should be proceeded in: to which the counsel for the prisoner objected, That the trial could not be proceeded in, because the jury had yesterday been dismissed without being inclosed; and the adjourning after the proof was finished, and the allowing the jury to separate before inclosing, was contrary to law, referring to the statute 91. parl. 11. James VI. in support of the objection. And although he did not suppose, or believe, that any undue influence had been used with the jury to the prejudice of the prisoner, which was the thing intended to be guarded against by the statute; yet as, by the jury's being dismissed, there was an opportunity and possibility of such undue influence being used with them, the case fell within the statute; and the accident which had happened was sufficient for operating an acquittal to the prisoner.

It was answered, on the part of his Majesty's Advocate, That as the dismissing the jury was owing to an unforeseen accident, which could not be prevented, the case did not fall within the statute; more especially, as the jury had not been inclosed before they were dismissed.

The court ordered the trial to proceed, reserving the consideration of the objection till the verdict be returned.

The jury, all in one voice, found the pannel guilty, art and part, of the attempt to poison Margaret Ronald her sister.

Upon this the counsel for the prisoner repeated the objection formerly stated, and insisted, That no judgement could be pronounced on the verdict. The judges, after hearing counsel, pronounced an interlocutor, by which they superseded advising the verdict till Monday, the 27th June next, in the new session-house at Edinburgh; and remitted the consideration of the verdict, with the objection for the prisoner, to the high court of justiciary, to meet at Edinburgh the said day and place; and granted warrant for transporting the prisoner to the tolbooth of Edinburgh.

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The court of justiciary assigned the prisoner counsel; and the point was argued by them and the crown-lawyers at great length. After the hearing the court ordered informations.

That for the crown argued as follows.

"The prisoner's escaping from the punishment the offence merits, of which she has been found guilty by the verdict of her country, is of little consequence to the public; but it is of the utmost consequence to take care, that through her acquittal the law may not be wounded, and a precedent established, which hereafter, in cases similar, may be founded upon to screen from punishment persons guilty of the most atrocious crimes. *Interest reipublicæ ne maleficia maneat impunita.*

On the other hand, it is also of great importance, as was argued for the prisoner, that in these days of liberty and justice, no precedent should be settled, which, in after ages, and more corrupt times, may be made use of for supporting arbitrary measures in our judges, and depriving persons accused of crimes of any part of that fair and impartial trial they now enjoy in this supreme court, and all other our courts of criminal jurisdiction.

Anciently a scandalous practice prevailed, of prosecutors and their adherents laying before the jury, after inclosed, evidence which had not been adduced in the course of the trial; and of soliciting, and even of menacing, the jury to bring in a future verdict.

To prevent so corrupt and wicked a practice, which is scarcely credible, if we had not authority from the legislature for believing it, two statutes (Ja. VI. parl. 11. c. 90. 91.) were made. By the first it was enacted, "That, in all time coming, the hail accusation, reasoning, writs, witnesses, and other probation, and instruction whatsoever of the crimes, shall be alledged, reasoned, and deduced, to the assize, in presence of the party accused, in face of judgement, and nae otherways."

By the second it is enacted, "That if any of the assizers have any doubt, wherein they would be resolved, they are to propose
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“ the same, in the presence of the parties, before the judges, and
 “ before their going out of judgement.” Then directions is given
 for inclosing the jury immediately after the chusing of their chancellor;
 and that no person shall be suffered to be present with them, or
 to go in to them, neither clerks or others, under pretence of giving
 further information, or any other colour or occasion whatsoever; and
 that they be not allowed to come out of the house in which they are
 inclosed for any cause whatsoever, or to delay the giving of their sen-
 tence till another time: “ But that they be inclosed, as said is, un-
 “ to the time they be fully agreed, and return their answer be the
 “ mouth of the said chancellor to the judge.” Then follows that
 part of the statute upon which the counsel for the prisoner have
 founded their plea: “ That gif any of the said accusers, informers
 “ of his Hienes Advocate, or other persons whatsomever, pretend
 “ in onyways, in time coming, to inform, sollicite, reason, dispute,
 “ speak, or repair, to the said assize, after their removing furth of
 “ judgement, and inclosing of them, in manner above written, or
 “ otherways transgress any point of this present act; in that case
 “ the party accused shall be halden and pronounced clean and inno-
 “ cent of the crimes and treasons then laid to his charge. And this
 “ present act shall be ane sufficient warrant to all assissors in crimi-
 “ nal causes hereafter, to pronounce the party accused clean and in-
 “ nocent, in case any of the premisses beis contraveened.”

When this statute is transgressed, the jury are authorised, on that
 account, to bring in their verdict for the pannel. And it is not to
 be doubted but that the jury who tried the prisoner, would have
 done so, if they had understood the statute to have been counteracted
 from their being adjourned on account of the accident that occurred;
 because this objection was made by the prisoner, and they were fully
 apprised by her counsel of the nature of the statute, and their
 powers arising therefrom, previous to the returning of their verdict.

At the same time it is not intended to be maintained, That be-
 cause the jury returned their verdict, finding the prisoner guilty,
 which is a virtual declaration of their understanding the statute not

to have been transgressed, that therefore your Lordships are barred from taking cognisance of this matter. His Majesty's Advocate does admit, that where evidence is brought, or where it does appear upon the fact, as admitted, that the statute has been broke through or counteracted in any instance, it is lawful and competent for your Lordships to give relief, although the jury has returned the verdict against the pannel; to construct the law otherwise, would be laying a foundation for rendering ineffectual the salutary regulations introduced by the statute.

The plea of the prisoner, as founded upon the statute, resolves into this, That as, by the adjourning of the trial, and dismissing of the jury, an opportunity was given of informing, soliciting, speaking, and using influence with them, of every kind; so every thing is to be presumed favourable for a pannel; and therefore the prisoner's case falls within the statute; as it is not necessary that she should prove solicitation, or other undue influence, being used with the jury, it being sufficient that there was an opportunity, and possibility of such undue influence being used, which is all that is required by the statute for procuring an acquittal to the pannel.

Both statutes were calculated for wise and good purposes; but, like to all other statutes, they have not received, and ought not to receive, a judaical interpretation in things where an infringement of them cannot possibly be meant or intended.

Thus Sir George Mackenzie, in his title upon *Affizes*, § 10. when discoursing upon the aforefaid statute, says, "That the practice allows assizers some time to send out some of their number to the justices to receive informations in matters of fact; and finds, that in so doing they transgress not this act; as in Kennedy's case, August 1662."

The reason of the practice and judgement referred to is obvious: That the jury's desiring and receiving information from the court, could not be attended with any of the bad consequences intended to be prevented by the statute.

Again, Sir George Mackenzie, in the next paragraph, informs us, that,

that, after a full debate, it was found by this court, upon the 24th December 1672, That assizers dismissing after having voted, was not sufficient to annul the verdict, although it was not subscribed by the chancellor when they dismissed, notwithstanding of its being argued, That there might be great debate upon the wording of the verdict; and therefore that the assize should not have disclosed until the verdict was subscribed.

Further, the statute 1691 directs, That the chancellor should be chosen before the jury are inclosed; and that no person, not even the clerk, should be present with them, or go in to them. But in practice it is established, that the chancellor is always chosen after the jury are inclosed; and the clerk was in use of continuing with the jury, to assist them in drawing up their verdict, until it was discharged by the regulations 1672.

In these instances has the enactment of the statutes been broke through, where there was no hazard of the evils taking place which was intended to be corrected by the statutes. And many cases might be figured, where, for the same reason, an intercourse or communication between a jury, after inclosing, with the rest of the people, would not be sufficient to operate an acquittal to a pannel. If, after inclosing, a jurymen should be taken so ill, as to render it necessary to have assistance from without to save his life, or if the house or room wherein the jury were inclosed, should take fire, so as to oblige them to leave the house, or to use assistance in making their escape; and in all other cases of the same kind, it could not, in justice, be maintained, that an intercourse of that sort between the jurymen and the people would be sufficient for operating an acquittal to the pannel, although, from such accidents, a possibility was created of soliciting or using undue influence with the jury. The statute guards against wilful transgressions; but that, nor no other statute, ever enacted against acts of necessity. It is a common and just saying, That necessity has no law; and from it it may be justly inferred, that although it is unlawful to permit any person to go in to a jury after inclosed, or for the jurymen to hold intercourse with the people

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people without ; yet, if such things do arise from unforeseen and insuperable accidents, they cannot be constructed unlawful.

For these reasons, it might with justice be maintained, that although the accident which gives rise to the present question had occurred subsequent to the inclosing of the jury, yet it would not have been sufficient for operating an *essoins* to the prisoner, because it arose from necessity, founded upon an act of God, which no person could foresee or prevent.

But what at once puts an end to the prisoner's plea, so far as founded upon the statute, is, that her case does not at all fall within the statute ; because the dismissing of the jury, and the intercourse between them and the people in consequence thereof, happened prior to their being inclosed ; whereas the statute only prohibits all intercourse after the jury is inclosed.

Agreeable to this, we have two judgements in the books of Adjournal, in cases pretty similar to the present, and wherein a distinction between an intercourse with a jury before and after inclosing was made and established. The first occurred in a criminal prosecution at the instance of Barns *contra* Barra, in January 1704, where, after the verdict had been returned against the pannel, the following objections were offered in arrest of judgement.

1^{mo}, That after the house was hushed, and their Lordships had gone out of court, ordering the affize to inclose ; yet, for the space of two hours thereafter, they did not inclose, but continued discoursing with Barra and his friends, who no doubt were soliciting them all the time, and did take their supper in the same room where they were inclosed, some of Barra's friends having supped with them ; and this can be proven by the macers of court, and several others.

2^{do}, After the affizers were ordained to inclose, they dissipate, and two of the affizers, viz. William Seton and Walter Wylie, went not only out of the room where they were to have inclosed, but went home to their own houses, and other places in the town, and staid more than two hours, and did not return till after the affize was in-

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closed and fet, and sent the macers for them. This can be proven by the macers and affizers themselves.

3^{tio}, After the affizers were inclosed, Barra elder and younger, with Mr Boyes their agent, and Alexander Barns's nephew, endeavoured by all means to have access and opportunity to speak with the affizers; and for that end went round the house, when the macers refused them entry at the door, that they might speak with the affizers at the windows; and at length the matter was so ordered, that Sir Alexander Brand, one of the affizers, came out of the room where they were inclosed, to the next room, and spoke to Barra elder and younger, or those that were with them, out at the widows that looks to the tolbooth, and desired them to go and get the sheriff of Aberdeen's decret against Barns from Mr Leslie, Barra's advocate, for proving that the matter was *res judicata*, and that the assize could not proceed any further until that decret was brought to them; and told them what points the assize had found proven, and what not. And this can be proven by James Guthrie macer, and his servant James Mercer, and Mr Boyes, and Mr Alexander.

The interlocutor of the court pronounced upon these articles was,
 " Finding the third article of the said complaint, as it is libelled,
 " relevant to annul the verdict, in the terms of the act of parlia-
 " ment; reserving to the Lords to consider how far the affizers, or
 " any others contraveners, shall be liable to an arbitrary punish-
 " ment; and admits the same to probation."

It is indeed true, that by the above judgement of the court, the two first articles, which happened prior to the inclosing, are not found irrelevant; but then it is clear, that if they had been relevant in the opinion of the court, the judges would have found them so; or otherwise they would have been doing injustice to the pannel; for he might have been able to prove one or both of the two first articles, without being able to bring evidence of this last; and therefore no reason could possibly subsist, for there being no notice taken of the two first in the judgement, but that they were understood by the court to be totally irrelevant; which makes the case a precedent

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in point, as the two first articles averred on the part of Barra, were infinitely more within the intendment of the statute, than the fact which occurred in the prisoner's trial at Perth.

The other case proposed to be mentioned, was a suspension offered to this court in the 1754, against a sentence of the sheriff-depute of Renfrew, condemning one Robert Lyell to be hanged, who had been indicted for repeated thefts, and found guilty by a jury.

The suspension was founded upon the statutes, and the same plea maintained as in the present case. And a proof being allowed, it was proved, That James Maxwell, a jurymen, went down stairs at ten o'clock at night, during the course of the probation, to get a refreshment, being faintish; and that he, and John Marshall, another jurymen, went to a grocery-shop, at the distance of forty yards, and called for some white-wine and biscuit; and that after drinking two glasses of wine, they returned to the court: That John Ker, a jurymen, went out, and ran up to his own house, which is nearest to the court-house, and, without sitting down, brought away with him a bottle with some spirits, and immediately returned to court: That John Davidson and John Hart, jurymen, went out about nine o'clock at night for some refreshment, being faintish; and for that purpose went to the post-office, about forty or fifty yards distance, and there drank some wine, and eat some bread; and that John Davidson was absent about ten or fifteen minutes: That in returning to the court, the said John Hart met one John Fulton, with whom he returned again to the post-office, and talked to him about letting him a farm: That he staid with the said John Fulton about ten minutes, and then returned to the court: That while he was with John Fulton in the post-office, he joined a company which were drinking in the room, and took part of their liquor; and that while he was absent, a witness was examined upon a fact, which the jury did not find proven; but that he heard the deposition of that witness read over after he returned to the court: That William Jackson, a jurymen, ran down stairs to the house of James Millar, and drank a single

bottle of ale by himself, being very thirsty, and returned as fast as he could.

Your Lordships, upon advising the proof, which had been printed, and given in to court, “refused the bill of suspension; but continued the former list of the execution of the sentence of death pronounced against the said Robert Lyell till Thursday the 31st of January instant; and upon that day they ordained the said sentence to be put in execution.”

If those facts, in the case of Lyell, had been proved to have happened after the inclosing of the jury, it would have brought the case directly within the statute; and your Lordships must have suspended the sheriff's sentence, and must have acquitted Lyell: but as they happened prior to the inclosing, and did not fall within the reason of the law, as no bad intention was proved, the court paid no regard to them: and much less can any regard be paid to the prisoner's plea, so far as founded upon the statute; as the fact which she endeavours to take advantage of, not only occurred prior to the inclosing the jury, but arose from necessity, which no human prudence could prevent.

Another plea was set up for the prisoner, importing, in substance, That, by the constitution and usage of this court, no adjournment could be made after the proof is begun, until the jury is inclosed, and their verdict prepared, without the express consent of the prosecutor and pannel; and therefore, that, as in this case, an adjournment had been made between the taking of the proof and the inclosing of the jury, without such consent, it must prove fatal to the trial, and operate an acquittal to the prisoner. And for evidence of the practice of the court, the whole books of Adjournal were appealed to, where no instance is to be found of any adjournment after the proof was begun, and the inclosing the jury, excepting in the case of Provost Stewart, which was done by express consent; and other two cases taken notice of by Sir George Mackenzie in the title of *Affizes*, § 11. mentioned to have happened in the 1665 and 1669, but which, he says, were thought *mali exempli*.

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It is believed, there is nothing to be found in our law-books, or the records of this court, which determines the constitution of it to be such as is maintained on behalf of the prisoner. It is indeed true, that, excepting in the cases above mentioned, the uniform practice of the court has been, so far as is known to the prosecutor, to inclose the jury immediately after the proof was concluded, and counsel heard upon it; and it is certainly the regular and proper manner of proceeding, as thereby jurymen are prevented from receiving undue impressions, or being influenced by any thing else, than the evidence adduced before them.

But, as has already been observed, every general rule of this kind, however salutary and expedient, and however well established, either by law or inveterate usage, must yield to necessity. It might be of dangerous consequence, and highly inexpedient, to vest judges with an arbitrary power of adjourning criminal trials, when and how often they should think proper; but it would be equally inexpedient, and of dangerous consequence to public justice, to have it established as law, That judges could not adjourn a trial, when the proceeding in it became impossible by the act of God, or any other insuperable cause.

The cases mentioned by Sir George Mackenzie were voluntary adjournments, without any sort of necessity; which his Majesty's Advocate does not wish to see drawn into example, nor has he any desire to exercise the power that was assumed by his predecessors in those cases: but what he maintains is, That as the sudden illness of one of the jurymen at Perth, rendered it impossible at that time for the jury to be inclosed, it was in the power of the judges, for a time, to adjourn the trial, until it should be known whether the jurymen recovered, and could return into court. And in this, he apprehends, he is well founded in reason and in justice.

If the jury had, of their own motive, dismissed and gone home, and had next day returned and inclosed, there would have been just reason for declaring their verdict void; because every thing was to be presumed against such a jury: but where their dismissal or adjournment

ment arose from the act of the court, founded upon necessity, there is no cause for presuming any thing against the jury. And it seems to be contrary to law and sound reason, to maintain, that the court, in such a case, had no power to dismiss or adjourn them.

The case of Provost Stewart does not at all impugn what is here contended for; on the contrary, it confirms the justice of it. In that case, the motion for a continuance, or adjournment of the trial for a further time, proceeded from the jury; some of whom were unable to hold it out longer, without rest and relief, they having been in court upwards of forty hours; and every person concerned in the trial were much in the same situation. In such a case, an adjournment or delay became matter of necessity. And although the prosecutor and pannel readily agreed to give their consent to the delay, yet the judgement of the court was not founded upon the consent alone; but the diet was continued, in respect of the consent, *and of the necessity of the case*. These are the words of the interlocutor.

If the adjournment, or continuance of the diet of the court, after the commencement of the proof, and before the inclosing of the jury, is contrary to any constitutional rule of the court, established either by law or usage, it will occur to your Lordships, that the consent of parties was not sufficient to dispense with that rule. Consent may cure an informality in procedure, but cannot authorise or justify the breaking through any constitutional rule of court, or fundamental principle of law; and therefore it is pretty evident, that the judgement of the court, in the case of Provost Stewart, could not have been founded upon the consent of parties, but upon the *necessity* of the case, which is an exception to every rule.

The counsel for the pannel, unable to maintain her plea upon the authority of any of the law-books of Scotland, had recourse to the law-books of England; and from them endeavoured to prove, that where, in capital cases, a jury was charged with a prisoner, they could not be discharged before their verdict was ready.

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The lawyers of England have wrote with much learning and great accuracy upon their criminal law; and as to the nature of crimes and punishments, they may, in many cases, with justice, be recurred to. But in questions of this kind, respecting the form and manner of judicial proceedings, their law-books can be of little authority with us; as the forms and practices of judicial proceedings, in the two countries, differ widely from each other.

But, upon looking into the law-books of England, it is apprehended, that the prisoner cannot draw even any aid from them in support of her plea.

The method of putting off or delaying trials in England, seems to be, by withdrawing a juror, or discharging the jury. The first is generally followed in civil cases, the latter in criminal.

It appears to be unfetled, and a matter much disputed, Whether, in capital cases, a jury charged with a prisoner can be discharged without returning their verdict? Lord Coke has given his opinion, That the jury cannot be discharged. There are precedents on both sides; and Lord Chief Justice Hales, in his Pleas of the Crown, vol. 2. p. 294. which is a book of the greatest authority in the law of England, has given his opinion that the jury may be discharged. His words are, "By the ancient law, if the jury sworn had been once particularly charged with a prisoner, as before is shewed, it was commonly held they must give up their verdict; and they could not be discharged before their verdict given up. And so is my Lord Coke, P. C. cap. 47. p. 110. And this is the reason given 22. E. 3. Coron. 449. why, after the plea of, Not guilty, and the inquest charged, the prisoner cannot become an approver, because the inquest shall not be discharged. But the book at large, viz. 21. E. 3. 18. A. mentions, not the charging of the inquest, but the plea of Not guilty, and the jury at the bar; Co. Lit. 227. b. But yet the contrary course hath for a long time obtained at Newgate; and nothing is more ordinary, than after the jury sworn, and charged with a prisoner, and evidence given; yet if it appear to the court, that some of the evidence is kept back, or taken off,

" or

“ or that there may be a fuller discovery, and the offence notorious,
 “ as murder or burglary, and that the evidence, though not suffi-
 “ cient to convict the prisoner, yet gives the court a great and strong
 “ suspicion of his guilt, the court may discharge the jury of the pri-
 “ soner, and remit him to the gaol for further evidence: And ac-
 “ cordingly it hath been practised in most circuits in England; for
 “ otherwise, many notorious murders and burglaries may pass un-
 “ punished by the acquittal of a person probably guilty, where the
 “ full evidence is not searched out or given.”

Mr Emlyn, in his notes upon that paragraph, takes the opposite side, and quotes many authorities in support of his opinion; almost all that were mentioned by the counsel for the prisoner in this case.

But to him, and his authorities, and all that were mentioned by the counsel for the prisoner, this general and satisfying answer does occur, so far as respects this case, That they only regard the voluntary discharging of a jury, upon the motion of the court, or of any of the parties, without there being any necessity therefor. This observation, it is imagined, will be found to apply, and to afford a sufficient answer to all authorities that the counsel for the prisoner will be able to bring from the law-books of England.

As to the discharging of juries, in the cases of necessity, there seems to be no doubt of it in the law of England. Lord Chief Justice Hales, in the paragraph immediately following that above recited, says, “ If, after the jury sworn, and departed from the bar,
 “ one of them, viz. A, wilfully goes out of town, whereby only e-
 “ leven remain, these eleven cannot give any verdict without the
 “ twelfth; but the twelfth shall be fined for his contempt; and that
 “ jury may be discharged, and a new jury sworn, and new evidence
 “ given, and the verdict taken of the new jury. And thus it was
 “ done by good advice, at the gaol-delivery at Hartford, August 15.
 “ Car. I. in the case of Hanscom, the departing jurymen.”

In another place, (vol. i. p. 35.), when treating of the effects of madness and lunacy in crimes and trials, he says, “ But in case a
 “ man

“ man in a phrenzy, happen, by some oversight, or by means of
“ the gaoler, to plead to his indictment, and is upon his trial, and
“ it appears to the court, upon his trial, that he is mad ; the judge,
“ in discretion, may discharge the jury of him, and remit him to
“ gaol, to be tried after the recovery of his understanding, especial-
“ ly in case any doubt appears upon the evidence, touching the guilt
“ of the fact; and this *in favorem vite*.”

The necessity in those cases is apparent. In the one case, the jury could not be inclosed, because there was no complete jury to inclose; which therefore, agreeable to the form of judicial proceedings in England, made it necessary to discharge that jury, and to impanel another, that justice might be done. In the other case, the madness or phrenzy of the prisoner created a legal necessity for putting off the trial, by discharging the jury, because of his inability to conduct his defence.

Duncomb, in his treatise upon Juries, who concurs in opinion with Lord Coke, as to the impropriety of discharging juries in capital cases, yet has the following paragraph, c. 12. p. 200. as to matters of necessity: “ And if the case so happen, that the jury can in no
“ wise agree in their verdict, as if one of the jurors knoweth in his
“ own conscience the thing to be false, which the other jurors affirm
“ to be true, and so he will not agree with them in giving a false
“ verdict, and this appeareth to the justices by examination; the justices may, in such case, suffer the jury to have both meat and
“ drink for a time, to see whether they will agree. And if they will
“ in no wise agree, the justices may take such order in the matter as
“ shall seem to them, by their discretion, to stand with reason and
“ conscience, by awarding of a new inquest, and by setting fine
“ upon them, that they shall find in default, or otherwise, as they
“ shall think best by their discretion.” Likeas they may do, if one
of the jury die before the verdict.

In the Reports of Judge Foster, lately published, the following case, p. 76. is reported: “ At Newgate sessions, in January 1750, present
“ Lord Chief Baron Parker, Mr Justice Foster, and Mr Justice Birch,

F f

“ Elizabeth

“ Elifabeth Meadow was brought upon her trial for stealing out of a dwelling-house to the value of 40 s. or upwards.

“ While the prosecutor was giving his evidence, it was observed, that the prisoner was extremely discomposed, frequently fainting, and screaming out as in great pain; and some of the jury doubting whether she had not the pains of labour on her, the court desired two matron-like women to go to the bar to her; and they desiring she might be removed into a private room, it was immediately ordered, and the women went with her. One of them soon afterwards returned; and being sworn, declared, That, according to the best of her judgement, and she had born twelve children herself, the prisoner had the pains of labour upon her, though much before her time. The court thereupon ordered her back to Newgate, and that proper care should be taken of her there; and discharged the jury of her.”

From these authorities, it is evident, that by the law and practice of the courts in England, a jury charged with a prisoner, even in a capital case, may be discharged, if the trial from necessity cannot be proceeded in. And much more must that hold in cases like to the present, which are not capital.

If the counsel for the prisoner will then insist, That the maxims and rules of the law of England should be adopted in this case, they will be compelled to agree, if the law of England stands as the above authority seems clearly to point out, that your Lordships must be at liberty to do what would have been done in England, if this case had occurred there, or to do something equivalent for the security of public justice; for it seems clear, that such an accident as occurred at Perth, would not in England procure an acquittal to the prisoner.

Whether, in such cases, justice is to be done by discharging of the jury, or by continuing the diet by adjournment, is immaterial to the public. Your Lordships are vested with full powers, and will consider what is most fit to be done, as well for the protection of the innocent, as the punishment of the guilty, which coincide with each other.

other. If it shall be thought proper to adopt the law of England, no pannel can complain; for it secures a fair and impartial trial to him, which is all that any person in reason can desire. If your Lordships shall think it more fit to do justice in such cases, by the adjournment of the court, and continuance of the diet, it does not occur that any bad consequence can arise from it: And it has the advantage of less novelty in appearance, and more adapted to our notions of judicial proceedings, and to be perfectly well founded in the principles of law and reason; for there can be nothing more consonant to them, than that every court which has a jurisdiction for trying of crimes, should be understood to have and hold all powers necessary for explicating that jurisdiction, and rendering it useful to the public, even in such cases of difficulty and necessity."

The argument for the prisoner was thus stated. "The question for your Lordships consideration is, Whether a jury, after being sworn, and the whole evidence taken, can, without consent of the prisoner, be allowed to separate, and be adjourned to another diet? It will readily be admitted, that this is a question of the utmost importance that ever came before the court; not on account of punishing this prisoner, even upon the supposition of her guilt; for it can have no bad influence, either with respect to her or others, that even a guilty person should escape justice by an accident; one of such a kind too as never happened before, and is most unlikely ever to happen again; but the question is of importance, on account of its general consequence to that part of our law upon which all our lives and liberties depend.

Human wisdom could not devise any method of trial so well calculated for the security of liberty as that of trial by jury. No man is in hazard of oppression who is to be tried by fifteen of his equals, good and lawful men, chosen indifferently from the body of the people, and who, as soon as they have given their verdict, return to their private station, and are liable to be tried in the same manner themselves. As it is the business of the jury only to try facts, skill

in law is not required; and therefore the chief thing necessary is to guard the jurymen against influence, evil counsel, and corruption. To prevent or remedy abuses of this kind, our law has ever been most anxious. Particularly, in the year 1587, two acts of parliament were made, which rather seem to be one act split into two parts; for the preamble of the first serves both. The first (1 Jac. VI. parl. 11. cap. 91.) is intitled, *The haill proceſs and probation ſhall be uſed before the aſſize, in preſence of the party accuſed and his procurators.* It is in the following words: "Our Sovereign Lord, conſidering the wrongs alledged ſuſtained by divers noblemen and others, lieges of this realm, being accuſed of treaſon, by ſolliſting, boaiſting, and menacing of the aſſize after they were incloſed; the accuſers, and other perſons, their favourers, having liberty to paſs to the ſaid aſſize, and produce to them ſick writs and witneſſes, and other probation, as they pleaſe, to verify the crime, outwith the preſence of the parties accuſed; whereby the juſt defence of their lives, lands, and honours, was taken away: therefore our ſaid Sovereign Lord, with advice and conſent of the eſtates of this preſent parliament, has ſtatute, declared, and ordained, That in all time coming, the haill accuſation, reaſoning, writs, witneſſes, and other probation, and inſtruction whatſomever, of the crime, ſhall be alledged, reaſoned, and deduced to the aſſize, in preſence of the party accuſed, in face of judgement, and no other ways," &c. The enacting part of this act provides againſt laying before the jury the examination and depoſition of any witneſſes taken extrajudicially, or in abſence of the party accuſed; for the credit of any evidence depends greatly upon the manner of its being given, whether freely, voluntarily, or by extortion; of which the jury cannot judge, unleſs they hear and ſee the witneſſes examined, and confronted, and croſs-examined by the party accuſed. And the ſame reaſon ſubſiſts, why the extrajudicial confeſſion of a party, unsupported by other proof, is no legal evidence to a jury. The act guards againſt theſe abuſes, which are ſo great, that it is impoſſible to believe they could come on at once: they muſt have crept in by very ſlow degrees; which

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which shows how dangerous it is, in matters of such high importance, to relax in point of form upon any account whatever.

The other act (Ja. VI. parl. 11. cap. 92.) which immediately follows the one just recited, and seems to be the second part of it, is intitled, *Of assizes doubtand, and inclosing thereof*; and goes on as follows.

Item, It is statute and ordained, That how soon the hail
“pursuit, defences, and answers thereto, are fully heard by the as-
“sise, if any of the said assizers have any doubt whereof they would
“be resolved, that they propone the same openly in presence of par-
“ties, in face of the judgement, before they pass out of judgement
“themselves. And immediately after the said assize has chosen their
“chancellor, the clerk of the justiciary shall inclose the said assize
“them alane, or in an house by themselves, and suffer no person
“to be present with them, or repair to them in any ways, neither
“clerk nor others, under pretence of further information, resolving
“of any doubt, or any other colour or occasion whatsoever; but
“that the said house be holden fast, and no man present therein but
“the said assizers; and that they be not suffered to come out of the
“said house for whatsoever cause, or to continue the giving of
“their sentence to another time; but that they be inclosed, as said
“is, unto the time they be fully agreed, and return their answer by
“the mouth of the said chancellor to the judge. And our Sovereign
“Lord, with advice aforesaid, decerns, declares, and ordains, That
“if any of the said accusers, informers of his Highness's Advocate,
“or other persons whatsoever, pretend in any ways, in time co-
“ming, to inform, sollicit, reason, dispute, speak, or repair, to the
“said assize, after their removing forth of judgement, and inclosing
“of them in manner above written, or otherwise transgress any point
“of this present act; in that case the party accused shall be holden
“and pronounced clean and innocent of the crimes and treasons
“then laid to his charge. And this present act shall be a sufficient
“warrant to all assizers, in criminal causes hereafter, to pronounce
“the party accused clean and innocent, in case any of the premises
“bees contraveened.”

The:

The declared intention of this act plainly is, to prevent the affize not only from being over-awed by power, in case of arbitrary times, but also from being biassed or misled by art and sollicitation, which the law justly supposes will be made use of to pervert them, even in times of the greatest liberty.

It would appear, that, at the time this act was passed, it had been the custom for the clerk of court to remain with the jury until they had chosen their chancellor: for the act directs, "That, immediately after they had chosen their chancellor, the clerk shall inclose them alone, in an house by themselves." And though the act provides, that, after being so inclosed, even the clerk himself shall not repair to them, on any colour or pretence whatever; yet it would appear, that the clerk, perhaps under the pretext of their not immediately choosing their chancellor, had been in use to continue some time with them after the judges had left the court, or after they had gone into another room, in order to be inclosed; by which he had the opportunity of biassing them. It therefore became necessary to provide more explicitly against this abuse. This was done by the eighth article of the Regulations 1672, Char. II. parl. 2. ses. 3. cap. 16. which enacts, "That the clerk of the court, nor no other person, be present with the affize after they are inclosed." And by the uniform practice of the court ever since that period, the affize, immediately after the proof is closed, and summed up, is either left by themselves in the court-house, or carried to another room, where they are locked up, and kept separate from all intercourse with any other people, until they have settled their verdict. For this we have the testimony of all our authors who have wrote upon the criminal law.

Sir George Mackenzie, in his title of Affizes, paragraph 10. says, "When both discourses (viz. those of the counsel of both sides upon the import of the proof) are ended, *then the affize are inclosed*; but before they be inclosed, they should endeavour to be satisfied of any doubt: for if, after inclosing, any person speak to them, or if any of them come out of the place where they are inclosed,

“closed, until the verdict be pronounced, the pannel is *eo ipso* clean
“and innocent;” and he quotes the act of parliament last men-
tioned in support of what he says: which plainly shews what con-
struction he put upon that act: And he adds, that “the reason in-
“ductive of which act seems to be, fear of impressing or suborning
“the assize.” He farther says, in the beginning of the very next
page, “It was thought of old, that assizers behoved presently to
“determine after probation was led; and that it was not lawful to
“dismiss them, until they did enter, and return their verdict: and
“the reason of that opinion is, because, after the probation is led,
“there may be hazard of suborning the assizers, if the matter were
“continued to a new day: and it were to be feared likewise, that
“the pursuer, finding that the witnesses which he had led did not
“prove, he might be tempted to suborn others. *And I think this o-
“pinion strongly founded:* but yet, in the year 1665, a baxter being
“pursued for sedition, the justices did, at my Lord Advocate’s ear-
“nest solicitation, dissolve the court after probation was led, and
“continued the matter to a new diet; but the accusation was never
“farther prosecuted, and that procedure was thought *mali exempli*. Yet
“thereafter his Majesty’s Advocate continued an assize, who sat up-
“on Maenab (Macgibbon) for theft; for not being clear to con-
“demn upon an extrajudicial confession, they proposed the case af-
“ter they were inclosed; whereupon the justices continued the diet
“till the next day; and having consulted the council, they there-
“after found the confession sufficient, and inclosed the assize, not-
“withstanding of this objection. November 1669.” Here is Sir
George Mackenzie’s opinion in express terms, with his reasons for
that opinion. And as to the decisions which he quotes, the first, he
says, was not further prosecuted, because *mali exempli*; and the o-
ther, viz. that of Macgibbon, is indeed a very extraordinary one,
and a reproach to our records. It is confessedly in the face of both
the acts of parliament; for here the jury were forced by the privy
council, under the threatening of an assize of error, to condemn up-
on an extrajudicial confession, which is a plain breach of the first
statute;

statute ; and they were adjourned after being inclosed, which is as plain a breach of the second.

It was owing to instances and decisions of this kind, by the interference of the privy council, that, in the declaration of the estates of parliament, and articles of grievances, represented by the estates in the year 1689, it was declared, " That the sending letters to the
" courts of justice, ordaining the judges to stop or desist from de-
" termining causes, or ordaining them how to proceed in causes,
" was contrary to law ; and that the assizes of error were a grievance ;
" and that juries should be considered by parliament."

Perhaps Sir George Mackenzie, in those times, durst not in words express his sentiments of these decisions ; yet he states them in such a way, as to shew what he thought of them.

The late Lord Royston, a great criminal lawyer, in a manuscript left by him, containing some observations upon Sir George Mackenzie, has the following note upon the passage above quoted. He says,
" Since ever I have been a judge, the form uniformly observed was,
" to ordain the assize to inclose *immediately* after the proof is ended.
" But whether a total nullity, *inquirendum* ; though it would seem
" there is *eadem ratio* for it, as when, after inclosing, any of them
" go out, or speak to any person out of doors."

Mr Erskine, in his Institute, book 4. tit. 4. § 60. lays down the same thing. He says, " After all the witnesses have been examined
" in court, the assize are shut up in a room by themselves, where
" they must continue excluded from all correspondence, till their
" verdict or judgement be subscribed by their foreman and clerk."
In short, this is the uniform voice of all our authors, and is confirmed by a constant practice ; for which we need only appeal to your Lordships own experience. Such it is also supposed and understood to be by the latest act we have in relation to trials, to wit, 21st Geo. II. cap. 19. § 7. ; which enacts, " That it shall be lawful
" for the court of judicary to try crimes not inferring death or de-
" membration, without taking down the evidence in writing:" And it is added in § 8. " but in such cases the counsel on both sides, and
" the

“ the pannel, may interrogate the witnesses; and, *immediately* before the assize or jury shall be inclosed, the evidence shall be summed up by the judges, before whom such trial shall be had, or one of them.” Here the legislature plainly understands, that the assize is to be *immediately* inclosed.

The argument urged on behalf of his Majesty's Advocate, amounts to this: “ That although the narrative of the act in the 1597, cap. 92. seems to suppose, that the jury are immediately to inclose, yet it no where statutes and ordains them to do so. The period of time, to which alone the enacting part of that act relates, does not commence till after the jury is inclosed; the intermediate time between the conclusion of the evidence and the inclosing of the jury, is not provided for by the enacting words of that act; as therefore there is no provision in the statute in this respect, it must follow, that the court has a discretionary power to adjourn, in cases of necessity, such as this; but that no doubt the court will be tender in the use of that power, so as to secure justice without injuring liberty.”

In answer to this, *first* of all, it may be observed, that such an interpretation of the act would render it entirely elusory. There is clearly equal reason, after the evidence is finished, to prevent the intercourse of the jury with other people before being inclosed, as there is after their being inclosed; nay, there is much stronger reason. Jurymen, though unexceptionable as such, are not of that rank, education, and skill, as to set them beyond hazard of being imposed upon and misled. After they are inclosed, and while they remain together, they have the sense, skill, and ability, of the whole united, to resist such as would practise upon them; but when, by an adjournment after evidence, they are allowed to separate, and each left to themselves, they are an easy prey to such as want to impose upon them. By how much the opportunity is greater in that case than it is in the other, by so much is the danger greater. Not to speak of the influence of power, if arbitrary times should arise, and they may do so, a jurymen set at large, after evidence taken, cannot turn him-

self about, cannot go into any company, but the trial is the subject of discourse. Every art would be made use of, every instrument set to work; the characters of witnesses would be attacked by those whom a simple juryman would have no reason to suspect: so that in this manner he could never fail to be *laboured*, as it is emphatically called in the law of England: he would never fail to receive evidence extrajudicially, in the absence of the parties, and without the assistance of the court, and of his brethren. It is in this single and separate situation only, that there is the least room for corruption, when there is no witness to discover it. When they are together, they are a check and support to each other, against the influence of a bribe, and the menaces of power.

Nor is this all: for, not to speak of the distress and trouble which every juryman would be liable to by solicitation and importunity, an obstinate juryman, either from the power of one party, or from the despair of the other, might be brought into danger of being spirited away, or even of losing his life. Thus, what is reckoned a privilege, would become a burden, nay a peril; for the inclosing of a jury, which some of the English lawyers call an *imprisonment*, is even a protection to themselves, as well as a security to the party accused. Add to all this, that there is no limit proposed to the time of adjournment. If the jury may be adjourned for a day, they, for the same reason, may be adjourned for weeks, months, years: where is the limit in matters of this kind? Upon this footing, we should be better without juries altogether, leaving the management of trials entirely to judges, men of rank and education.

To say, therefore, that the law makes a distinction of the period before inclosing, from the period after inclosing, would be to make the act absurd: for surely it would be absurd, to provide for a case of less danger, and leave a case of greater danger altogether unprovided for; to distrust the discretion of judges in a case of lesser danger, and leave every thing in their power in a case of greater. After the jury are inclosed, the court have no discretionary powers to adjourn them upon any account. If this is not admitted, the act has no force

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at all. Had the very accident which happened here been after the jury were inclosed together, and if the jury had thereupon been adjourned to another diet, it is clear the trial must have been at an end: and yet this last would have been a case of as much necessity as the other; no transgression of the law by any person whatsoever; the sudden sickness of the juryman from the hand of Providence, in the one case as well as in the other.

A thousand parallel cases can be figured, which may be called cases of necessity as much as this can be. Suppose that, in terms of the act 1701, (for preventing wrongous imprisonment, and against undue delays on trials), which is the Scots *Habeas corpus*, a prisoner suspected of any crime, shall have intimated to his Majesty's Advocate to fix a diet for his trial; and that such diet shall have been, for reasonable causes, delayed till within a very few days of the utmost time; after which, the act provides, "That the process not being duly prosecuted, the prisoner is declared to be free for ever from all question or process for such crime or offence." When the day of trial comes, so many of the judges, by the act of Providence, are sick, and unable to attend, and make up a quorum: what would happen in case the time by the act limited for the trial should elapse? Could it be said, that, notwithstanding the act of parliament, the judges, on account of the *necessity of the case*, had a discretionary power to bring on the trial notwithstanding the statute? Your Lordships would not listen to such an argument. Statutes would have no force, could they be dispensed with by judges upon any account whatever.

But, with great submission, it is difficult to understand what is meant in the argument on the other side, by *cases of necessity*, and *that necessity has no law*. One may see a necessity why this trial was broke off: but where is the necessity of bringing it on again? But, say the gentlemen, it is a legal necessity; it is necessary that crimes should not go unpunished. True; but it is also necessary that they should be tried and punished according to law. The cases supposed, of a juryman's falling sick after being inclosed, or of a trial's being

disappointed by the sickness of the judges, after a prisoner has run his letters, in terms of the act 1701; all these may as properly be called cases of necessity as the present; and in them equal reason there is for giving the judges a discretionary power of dispensing with the law, as well as in the present. All such cases are, in short, no more than cases of expediency, at least they would by degrees make way for such, and tend to give courts, who are the sole judges of what is necessary, or what is expedient, a discretionary power of dispensing with express statutes. For let it be considered, that if the sickness of a jurymen shall once be admitted as a reason for adjournment, what determines the degree of sickness? It may come to be a very small one, which a jurymen would not fail to aggravate, if he wanted to put off the trial. Nay, sickness may be feigned, or even fits may be affected, in such a way, as it would be impossible for the court to find out the deceit: and it is probable this would be often practised, where a jurymen had any by-views; by which means, adjournments might become frequent: which would render the act of no effect.

Nor would this power be confined to the court of judicary alone, in which, because of the dignity and rank of the judges, more confidence could be reposed. For if your Lordships shall determine in this case, that a jury, after the evidence is closed, may be adjourned for such cause as the judge shall see necessary, your decision will be a rule for all the inferior courts in the kingdom; the evil consequences of which are too obvious to be mentioned.

But the meaning of this act does not depend on artificial reasoning and conjecture: when the words of it are attended to, it is plain it has not overlooked this case. The first of the two acts directs what shall be done with respect to the jury until the evidence is concluded. The second act takes them up where the first ends. It says, "*How soon* the hail pursuit, defences, and answers, are fully heard "by the assize, if they have any doubt," &c. they must propound the same openly, in presence of the parties, in face "of judgement, "*before they pass out of judgement themselves.*" Does not this clearly suppose

suppose they are instantly to pass out of judgement and inclose? that they can have no other opportunity of being in judgement (that is in court) again, to be resolved of any doubt? which would not be the case, if they could be adjourned to another diet. The act supposes what is the law, which is stronger than an express declaration of it, and then provides for the further case; and it goes on afterwards, and declares, "That if any of the accusers, informers of his Highness's Advocate, or other persons whatsoever, pretend in any ways to inform, solicit, reason, dispute, *speak*, or repair to the said assize, *after removing forth of judgement, and inclosing of them in manner above written*, or otherwise transgress any point in this act, the party accused shall be held clean and innocent," &c. The words, *removing out of judgement, and inclosing*, import one continued act, without the intervention of any thing else. If they do, there is an end of the question; if they do not, they must be taken disjunctively; which comes to the very same thing; for as the jury cannot be adjourned without *removing* out of judgement, and as it is impossible but they must have intercourse with other people in case of their adjourning, by the express words of the act the pannel is *eo ipso* acquitted. Let the prosecutor therefore chuse which he will, that the law means removing *and* inclosing, or removing *or* inclosing, the sanction is the same, that the "pannel shall be held clean and innocent."

If there were need of more, the concluding clause of the act is additionally explicit, and fastens the whole, declaring, "That this present act shall be a sufficient warrant to all assizours in criminal causes hereafter, to pronounce the party accused clean and innocent, in case *any of the premisses* be contraveened." Will any person who reads that act, restrict *the premisses* to the single case of intercourse after the inclosing? *Premisses* means the whole *points* in the act; intercourse after removing out of judgement, as well as after inclosing. But indeed it is clearly understood by the tenor of the whole act, that the jury shall not remove out of judgement except to inclose.

And

And it may be here further observed, that the law is so jealous of jurymens being tampered with in either case, that it has not put the sanction upon a juryman's being solicited; a thing which it would be impossible for the party to prove; but upon his being barely *spoke to*, upon any colour or pretext whatsoever, or even being in company with any other person, after removing and inclosing. The act establishes a *presumptio juris et de jure*, against which no proof can be admitted; and this very wisely, as a proof would in most cases be impossible.

The sense of the act being then so clear, it is the less necessary to say much upon some objections of an inferior class. It was contended on behalf of the prosecutor, That juries were in hazard of being tampered with before trial, as well as after, especially at circuits, where there are several trials; and as the judges generally divide the burden as equally as possible, the prisoner to be last tried may guess pretty nearly who may be upon his jury, and may, by means of his friends, tamper with them: that if the sense of the law is extended to jurymen not instantly inclosed, it may next be pleaded, That it is to be extended to jurymen before trial, as well as after evidence taken.

To this it is answered, That the sense of the act is not extended beyond its clear meaning; nor is there any occasion so to do. To say nothing of the few instances in which a pannel can guess who are to be of his jury, the law does not presume that the jury are to be influenced before they hear the cause, or that they are to judge of evidence before they know what it is; and, at any rate, it is clear, that the law does not take the jury in charge until they are once sworn and set; after which, the first act takes care of them till the evidence is closed, the second till they have signed their verdict.

It was next observed on behalf of the prosecutor, That, by accidents of this kind, very great criminals might sometimes escape. No doubt they may. But the answer to this arises from all that has been already said. There is no doubt but by accidents of this kind criminals may sometimes escape justice. But that is a much less evil, than

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to leave a discretionary power with judges to relax in the least from our strict forms, by means of which the innocent may be oppressed; nay, by means of which, a door would be opened, by allowing free intercourse with juries, to let the guilty escape. And it has been already observed, that the escape of a criminal, by such an uncommon accident, can never be an encouragement for any one to commit a crime: *Nemo deliquit ob spem talis eventus.*

But, in the *second* place, it is to be observed upon this head, There is an established distinction between civil and criminal courts, between matters of property, and matters of life and liberty. In civil courts, especially supreme ones, there is an *officium nobile*, a pretorian power, of tempering the strict forms of law, where equity is clear. 'Tis proper it should be so; and there is little hazard of their abusing such a power. But in criminal courts the case is quite different; there the *jus strictum* must be observed. Every thing is favourable on the side of mercy. The prisoner may lay hold even of accidents; he may lay hold of the least trifle to save his life. A wrong name or surname, even a wrong letter in his name, though he is ever so clearly described, and though guilty of treason itself, has been found sufficient in many cases to acquit him from punishment, and disappoint justice. In the case of General Gordon, attainted for high treason by the name of Major-General Thomas Gordon of Auchintoul, his real name being *Alexander*; although it was very clear who was the person meant; although the description would apply to no other; although it was admitted, that the description would have been sufficient if the word *Thomas* had been left out altogether; yet that slender mistake saved the corruption of his blood, and the forfeiture of his estate. And when it was proposed, as there was no doubt of his guilt, that a proof should be directed to be taken, whether he was the person described or no, and that this was *equitable*, one of his Noble judges used this remarkable expression, "That he knew no equity by which a man was to be hanged."

Cases even stronger than this are endless. Another person charged with treason escaped the law by a wrong letter in his name. There
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is no relaxing from strict form, no discretionary powers, in criminal matters.

In the *third* place, it was observed for the prosecutor, That if the prisoner should escape by this accident, she would gain little by it, because she might be tried a second time. But this is not the present question. If it were, it is humbly thought many of the reasons given would avail against such new trial; particularly, the act of parliament clearly excludes it. Other new reasons would also arise: for although a fresh jury would be summoned, yet nothing is more established in our law, than that no person can thole above one assize for the same crime. And the English lawyers give the reason of it, That it is unjust any man should be brought twice into jeopardy for the same crime, when he may not be so well prepared for it.

Having said so much on the construction of the act of parliament, some notice must be taken of a few decisions mentioned by the prosecutor, from which he would infer, that the act has been understood in his sense of it. But, upon examination of these cases, your Lordships will be of a very different opinion.

The first is the case of Barns against Barra, in the 1704, where there were mutual criminal libels for a riot, and a special verdict was returned. A representation was given in against the verdict, stating three articles as set forth in the prosecutor's information. The third of these was, That, while the jury was inclosed, some of them had held a conversation with one of the parties, asked papers from him, and told him what was going on. And the court, without taking notice of the two first articles, found the third relevant to annul the verdict; and accordingly did annul it. This the prosecutor is pleased to quote as a decision upon the two first points; which, he contends, are similar to the present. In answer to this, not to say that the points there were not parallel to the present case, it may be first of all observed, That it is somewhat uncommon to quote a decision, where *ex concessis* nothing was decided. But, in the *second* place, A clear reason will occur to your Lordships, why the court gave no judgement on the two first articles, namely, there was no occasion for

for it, as the third article was undoubtedly relevant, and a clear proof of it ready to be adduced; nay, it was in effect admitted by Bara's answer.

The other decision relied upon is as little to the purpose. In the 1754, Robert Lyell was tried, and condemned by the sheriff of Lanark for theft. He offered a suspension, in the nature of a plea in arrest of judgement; "setting forth the act of parliament first above mentioned, by which it is statute and ordained, That, in all time coming, the hail accusation, reasoning, writs, witnesses, and other probation and instruction whatsoever of the crime, shall be alledged, reasoned, and deduced, to the assize, in presence of the party accused, in face of judgement, and no otherwise;" and subsuming, That nevertheless, in direct breach of that act of parliament, several of the jurymen had gone out of court, and been absent during the examination of the witnesses; and therefore that their verdict ought to be found null.

A proof being allowed upon this bill of suspension, it turned out, that, during the examination of the witnesses, several of the jurymen had at different times gone out for a few minutes; some to ease nature; some for a little refreshment, being faintish; one to the post-house for a letter, and the like; but that they had instantly returned, and each of them had either heard all the witnesses examined, or, if they were absent during a few questions, had heard the depositions read over and acknowledged by the witnesses; and the court was pleased to refuse the bill of suspension, and the man was executed.

The prisoner has no occasion to enter into the merits of this decision, which has no relation to her case. The complaint there was laid entirely upon the first act of parliament, appointing the whole proof to be led in presence of the assize. It was not alledged, that there had been any contravention of the second act, upon which the present question entirely turns. It was not said, that after the proof was concluded, any of the jury had gone out of judgement; far less, that all of them had been adjourned to another diet: and nothing more needs be said of that decision, than that it would be dangerous

to argue from what was done upon the construction of one act of parliament, to what may be done upon the construction of another.

As to the two cases mentioned by Sir George Mackenzie, which have been already taken notice of, his Majesty's Advocate, with his usual candour, disclaimed them. He has too much love for his country, and the constitution of it, ever to wish to see such arbitrary measures drawn into example.

The case of Provost Stewart, instead of being against the prisoner, makes greatly for her; because, in that case, the diet was continued by consent of Mr Stewart; which plainly shewed the opinion of the court, that without such consent it could not be done. It is true, the interlocutor bears, that the diet was continued in respect of the consent, and of the necessity of the case; the meaning of which is no more, than that the necessity of the case is mentioned as a sort of apology for the consent, importing the opinion of the court, that even consent alone was not sufficient, without some very urgent reason; and it will be remembered by your Lordships, the court was very far from being unanimous in that adjournment.

In the *second* place, Even that case may be said not to fall directly under the second act of parliament; as the period to which the sanction of it applies, does not commence till after the evidence is finished. The adjournment in Provost Stewart's case was during the leading of the proof, and before the evidence was finished. But it is unnecessary to enter into these distinctions, as that adjournment was made by the express consent of parties, which was formally entered into the books of Adjournal, and subscribed by all of them; and though it may be true, that the consent of parties cannot justify the breaking through any constitutional rule of court, or fundamental principle of law; yet it would seem the court, in that case, thought the consent of the parties could justify the dispensing with a form introduced entirely for such parties benefit.

Having said so much on the law of Scotland, it may not be disagreeable to your Lordships, to mention how the law of England stands upon this question. Were it to be determined by that law,

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the prisoner is advised the decision would be clearly on her side. That law in general is still more nice than ours as to the demeanor of jurors, and more jealous, after the evidence is closed, of their being tampered with and misled. As soon as they depart from the bar, they are instantly inclosed, and a bailiff is sworn to keep them together, without meat, drink, fire, or candle; and that he shall suffer no person to speak to them until they are agreed of their verdict; (*Lord Coke, 3d Inst. 227. B.*) This is confirmed by Lord Hale, (*Pleas of the crown, vol. 2. p. 296. 297.*); who also lays down, "That if the jury agree not before the departure of the justices of gaol-delivery into another county, the sheriff must send them along in carts till they are agreed."

But to come nearer the present question, Lord Coke, (*1st Inst. 227. B. 3d Inst. 110.*), lays down the rule in these words. "A jury sworn and charged, in case of life or member, cannot be discharged by the court, or any other, but they ought to give a verdict." Here the rule is laid down in general, that even before evidence taken, a jury cannot be discharged: and his Lordship does not even except cases of the parties consent, or even cases of compassion, and for the indulgence and benefit of the prisoner. The same general rule is laid down in the other law-books after his Lordship's time.

Before mentioning any more of them, it is necessary to observe to your Lordships, that in England, where all cases, both civil and criminal, are tried by juries, they have a method, when they want *perimere instantiam*, which corresponds to our form of deserting the diet *pro loco et tempore*. This method is, by withdrawing one jurymen out of the number of the assize; after which the court is moved, that the jury is not full, and, of course, the instance falls *pro defectu juratorum*, and the trial may be brought on again before a new jury. How far this may be done in criminal cases, with consent, or out of indulgence to the prisoner, shall be mentioned by and by. The prisoner is at a loss to understand a distinction made on the other side, between withdrawing a juror and discharging a jury: she is advised, that in criminal matters, the method of dis-

-charging the jury, is by withdrawing a juror. The only distinction necessary to be attended to, is that between discharging a jury and continuing a jury, which no doubt your Lordships will keep in your eye. The rules laid down in the English law books, particularly that above mentioned from Lord Coke, generally apply to both; but the reasons are different. The hardship of bringing a man twice in jeopardy for the same crime, is the reason of the first; the hazard of tampering with the jury, or misleading them, is the reason of the second.

Hawkins, in his *Pleas of the Crown*, tit. Verdict, cap. 47. p. 439. says, "That it seems to have been anciently an uncontroverted rule, and hath been allowed even by those of the contrary opinion, to have been the general tradition of the law, That a jury sworn and charged in a capital case cannot be discharged (without the prisoner's consent) till they have given a verdict. And notwithstanding some authorities to the contrary in the reign of King Charles III. this has been holden for clear law, both in the reign of King James II. and since the Revolution." Viner, in his *Abridgement*, p. 338. lays down the rule still more fully: he says, "In capital cases a juror cannot be withdrawn, tho' all parties consent to it; but in criminal cases not capital, a juror may be withdrawn if both parties consent, but not otherwise. And in all civil causes, a juror cannot be withdrawn but by consent of all parties; *Carth.* 465. *Mich.* 10. *W. M. B. R.* in the case of *Chedwick v. Hughes*, said by Holt, ch. 1. to have been the opinion of all the judges in England, upon a debate between them at the sittings in Westminster, 19th November 1698, in a case of perjury tried before him between the King and Perkins."

It appears, however, that there are some instances, though very few, in capital cases, of discharging a jury, by withdrawing a juror after a jury was sworn, and charged with the prisoner; but then this was only done with the prisoner's consent, nay, at his earnest desire. Such was the case of Alexander and Charles Kinlochs, tried in the year 1746, at St Margaret's Hill, for high treason; where, before evidence

evidence was given, at their own particular desire, and out of indulgence to them, their jury was discharged; and, being afterwards tried and convicted by a new jury, they pleaded, in arrest of judgment, That their trial was null, because of the withdrawing the juror. After a very learned debate, which is recorded at length by Mr Justice Foster, (*Reports of Crown-Law*, p. 22.), their plea was overruled. It was thought they could not object to what had been done at their own earnest request. However, the judges were not unanimous in this; and it is remarkable, that though the Kinlochs were condemned, yet they were never executed.

The same learned judge reports the case of one Elisabeth Meadow, who took the pains of labour during her trial; and the court discharged the jury of her. But this was also out of indulgence to her; and indeed it does not appear that ever she was tried afterwards.

These cases are mentioned, to show, that it was thought a stretch of the common law in capital cases, though the evidence was not taken, to discharge a jury even with the prisoner's consent.

The prosecutor, in support of the contrary opinion, quotes a passage from Lord Hale, vol. 2. p. 294. wherein his Lordship says, "That notwithstanding the ancient law, as laid down by Lord Coke and others, yet the contrary course hath, for a long time, obtained at Newgate." It is true Lord Hale says so; but all the other books differ from him, and lay down the rule from the ancient law, as he calls it, which was always followed, except in arbitrary times. This passage in Lord Hale refers to the precedents of Whitbread and Fenwick. But if your Lordships look into the report of the Kinlochs case above mentioned, you will see how much Lord Hale is censured for what he says upon these cases, and that they were disclaimed by the attorney-general himself; who says, "That they did not cite these books with an entire approbation of the practice in every instance in which it prevailed; for some of the cases, particularly Whitbread's, ought never to be drawn into example; but only to show what the opinion of those times was." And the judges in the Kinlochs case, joined in condemning the proceedings in the case

case of Whitbread and Penwick as *cruel and illegal*. And this affords a sufficient answer to two or three cases which the prosecutor quotes from Hale and from Duncomb, and which he calls *cases of necessity*. Such of these as are not for the benefit and indulgence of the prisoner, (as in the case of madness), cannot be set up against so many clear authorities, recognised and established in so recent a decision as that of the Kinlochs above mentioned. Nor is consent, as the prosecutor alleges, confined to capital cases alone. In criminal cases not capital, the rule above mentioned laid down by Viner is held to be *triti juris*, as appears by two late cases, Reports of the Crown, p. 24. viz. "That of the King and Morgan, Hilary, 9th Geo. II. on an indictment for perjury; and "the King and Jelf, Trin. 7th Geo. II. on an indictment for barratry; "in both which cases Lord Hardwicke, at the sittings, refused to "withdraw a juror at the prayer of the King's counsel, because the "defendant's counsel refused to consent to it."

From all these authorities, it appears, that, had this case been in England, the jury could not even have been discharged, that is, the diet deserted *pro loco et tempore*, without consent of parties. But supposing that were otherwise, what has that to do with adjourning a jury after evidence given? There the law of England is clear; and the gentlemen on the other side have not only never attempted to produce a single authority, but have hardly attempted to argue the point. Adjourning juries after evidence given, is a step infinitely stronger and more hazardous, and the law of England does not admit of the least doubt upon it. For this your Lordships shall only hear one authority, namely, the resolution of the whole twelve judges in England, upon the trial of Henry Lord Delamere for high treason, in the year 1685; State-Trials, vol. 3. p. 378. The trial was not in parliament, but by commission to a Lord High Steward. After the evidence was taken, the prisoner earnestly requested, that the court should adjourn but to the next day, he being much fatigued with the length of the trial, and that he might be able to go through his defence. The Lord High Steward told him, That in the ordina-

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ry courts of judicature, it was an established point, That, after evidence given, the jury could not be adjourned, but must proceed in the inquiry, and be kept together till they are agreed in their verdict; but that he had some hesitancy whether that could be applied to this case, where the triers were peers, who, had the trial been in parliament, might adjourn; and he proposed to consult with my Lords the Judges; which was accordingly done. My Lord Chief Justice Herbert, after consulting with the judges, returned their answer; and, among other things, said, "My Lord, In the first place, where the trial is by a jury, there the law is clear; the jury once charged, can never be discharged till they have given their verdict. This is clear; and the reason of that is, for fear of corruption, and tampering with the jury: an officer is sworn to keep the jury together, without permitting them to separate, or any one to converse with them; for no man knows what may happen; for tho' the law requires honest men should be returned upon juries, (and without a known objection they are presumed to be *probi et legales homines*), yet they are weak men, and perhaps may be wrought upon by undue applications."

"This, my Lord, it is said, fails in this case; because the Lords that are to try a Peer, are persons of that great integrity and honour, that there is not the least presumption of their being to be prevailed upon in any such way; and for that reason, because of the confidence which the law reposes (and justly) in persons of their quality, they are not sworn, as common ordinary jurors are, but are charged, and deliver their verdict upon honour." And he goes on to say, "That had the trial been in parliament, the Lords might have adjourned," &c. "But whether being judges in that case, and in this case only in the nature of a jury, makes the difference, &c. we cannot presume to make any determination, &c. but submit the jurisdiction of your own court to your own determination." And the Lord High Steward thereupon, after delivering his opinion, refused to adjourn.

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The case is so much in point, that it is unnecessary to argue upon it. Nor can it make any distinction in the present question that it was a capital one. In public crimes, whether capital or not, our law makes no distinction as to the forms of trial, except in one particular, introduced by a special statute, against taking down the evidence in writing. This form, though depending merely on custom, required the force of a statute to alter it. The not adjourning juries in England after evidence is taken, so far as the counsel for the pannel are informed, depends upon custom merely, and reason. They have no direct act of parliament, as we have; and yet we have found no instance from any of the law-books of England, where ever a jury was adjourned on any account whatever.

We cannot agree with the gentlemen on the other side, that it is improper in this case to argue from the analogy of the law of England. In points of this kind, such an analogy will have the utmost weight with your Lordships. These two united kingdoms do still enjoy the happiness lost by other nations in Europe, to have their liberties secured by this noble institution of trial by jury. The present question goes to the very essence of that institution; and in that light it is fair and proper to argue from the custom in the one kingdom to that in the other. They ought to be similar in that, without which jury-trial would be only a name.

It was said on the other side, That we lived in happy times of liberty, when there was no hazard that the public prosecutor either would desire to oppress, or courts of law abuse, discretionary powers. This is, indeed a great truth; we certainly do live in such times: but that very circumstance throws us off our guard; we are apt to be too little jealous of exertions of power, when we see none used but those which are for our good. All history confirms this observation; and as an instance of it, it may be remarked, that in the reign of the great Queen Elisabeth, there were many exertions of power admitted of, which became precedents for those arbitrary measures pursued by some of her successors, to their and the nation's sad experience.

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Your Lordships, therefore, will consider well this case, and the consequences of it. The accident that happened was a very singular one, admitted never to have happened before in the course of several hundred years, and unlikely ever to happen again. Statute will provide for great and frequent inconveniencies. It would less wound the law, in case of such an accident, to take a verdict from the remaining part of the jury. Your Lordships would hardly take that step, though the number of fifteen depends on custom merely. But if a jury may be adjourned, the maxim, That our diets are peremptory in criminal courts, has no meaning. Such being the case, your Lordships will be loath to establish any precedent which may deeply wound the law, and render a statute, which has always been considered to be the *Magna Charta* of this country, entirely useless, and of no effect. And, to conclude almost with the words of a learned judge, (*Foster's Reports of crown-law*), your Lordships will consider, that the policy of the law of Scotland, and indeed the true principles of all government, will rather suffer many private inconveniencies, than introduce one public mischief. You will consider the trial by jury under its established forms, as part of the *jus publicum*, as a sacred *depositum* committed to the judges, which they ought to deliver down inviolate to posterity."

The interlocutor was in these words, July 11. 1763. "Find, That
"after the jury was sworn, and charged with the pannel, the trial
"ought not to have been adjourned; but that, from the necessity of
"the case, the jury ought to have been discharged, and the pannel
"subjected to a new trial: and therefore, as in this case the trial
"was adjourned, and the jury separated, after they had been sworn,
"and charged with the pannel, and that the jury did thereafter re-
"turn a verdict, find the proceedings null and void; and for that
"reason affoilzie the pannel *simpliciter*, and dismiss her from the
"bar."

Att. Montgomery, et alii.

Att. Swinton, et alii.

N^o 73.

February 1765.

The BRITISH LINEN-COMPANY, and his Majesty's Advocate,

A G A I N S T

JAMES BAILLIE, late Schoolmaster in Dundee.

Forgery not triable before the Justiciary in the first instance, when the indirect manner of improbation is to be used. — How an indictment differs from criminal letters.

THE indictment was laid upon the laws of this and all other well-governed realms; and it charged him with counterfeiting, &c. the notes of the British Linen-Company; and alledged, That by comparing the notes he had fabricated, with the authentic notes of the company, “and from other evidence, it *will appear*, that all and “each, or one or more, of the said notes, so specially above described, and found in your possession as aforesaid, are false and forged; and that you the said James Baillie are, and must be *presumed*, the forger thereof; and that one or more of them has, or “have, been uttered, changed, or used by you, knowing them to “be forged.”

His counsel objected, in the *first* place, That though forgery may be cognisable by the Justiciary in the first instance, when the direct manner of improbation is to be used; yet it is not when the indirect manner is to be used, as in the present case. The Session, in such case, has a privative jurisdiction; and the person accused must be remitted to the Justiciary, after the deed challenged has been improved by the Civil court. This procedure is necessary; because, *first*, the peremptory diets of the Justiciary are incompatible with the procedure in the indirect manner of improbation, in which *nunquam concluditur*. Besides, this manner would require such a long *federunt*, as would destroy both court, jury, prosecutors, and pannels. *2dly*, Great absurdities would follow, if trials, in such cases, were to proceed

ceed before the Justiciary in the first instance: for, notwithstanding the verdict of a jury, finding the deed challenged improbativ; yet it would remain still a good deed *ad civilem effectum*, till improved by the session: and it might happen, that upon an action of improbation being brought for that purpose, new evidence might be found out by the person accused, which the short *inducie* allowed him before the Justiciary had prevented him from laying before that court; and thus a contrariety of judgements might be occasioned: therefore it has been justly held hitherto, that the Session has the sole power of judging as to the *corpus delicti* in every such case; and the doctrine of the Roman law is the same; *l. 23. C. ad leg. Cor. De falsis*.

Answered, It would be very strange, if the supreme criminal court had not a power of trying one of the most atrocious crimes. A jury can, with the greatest propriety, try the fact as to the forgery, or using the writing forged. The notes, in this case, are the *corpora delicti*; but many cases might be figured, in which a trial for forgery might proceed, although the writing forged had been destroyed. What Mackenzie says upon this head is wholly inaccurate. He supposes, that there is a statute which gives the Session a jurisdiction as to forgery. But that is a mistake, though there is a statute giving that court jurisdiction as to false witnessing. And he is mistaken even as to the case of Lord Blantyre, which he quotes: for there was no remit in that case to the Session; and forgery in it was only charged as an aggravation of theft. Facts and circumstances may, with equal propriety, be judged by a jury as by the court of Session. But at the same time, the truth is, that the charge in the indictment is direct.—The prosecutors have no reason to apprehend, that the trial in this case will be uncommonly long. In many cases, trials for forgery have proceeded both before this court and the circuit, in the first instance, for forgery; Case of Macculloch, July 7. 1664; case of Nicolson, January 22. 1694; Houson, November 19. 1705; Gordon, November 1706; Adam, December 1709; Dunbar, November 15. 1714; Ramsay, July 9. 1716; Copland and Wilkie before

fore the circuit at Dumfries, May 1. 1741; Millar before the circuit at Air, September 19. 1754. — In many cases, a civil question may be prejudicial or preliminary to the criminal one; as in theft, if the pannel should plead, that the thing said to be stolen was his property; but that would be no reason for delaying the criminal action. Were it otherwise, such pretences would never be wanting.

Replied, When forgery is so atrocious as to merit a capital punishment, the pannel can be tried no where else than before the Justiciary; but the *corpus delicti* must depend upon the previous sentence of the Session. Nor is there any inconsistency in this procedure: for, properly speaking, it is only the trial of the forged deed, not that of the forger, which is confined, in the first instance, to the Session. It is necessary, that the writing challenged be produced; Stair, b. 4. tit. 20.; Bankton, vol. 1. p. 297. And the reason is plain: It is not the simple assimilation that constitutes forgery; there must be *dolus malus*; and that can only be presumed or proved by founding on or abiding by the deed in judgement: and if it be produced and abidden by, the next question is, Whether it be probative or improbative? A decree of improbation sufficiently ascertains the *corpus delicti*; and thereupon the trial may proceed, though the writings have been destroyed. The cases referred to by the prosecutors do not apply: for in these the trial was in the direct manner. But the pannel has discovered two cases that are in point for him. The first is observed by Fountainhall, in June 1683; the other is that of William and John Baillies in August 1715. [See N^o 29.]. As to what is said with regard to the crime of theft, the pannel will admit, that if the question of property depended entirely upon facts which could be easily settled in the course of the trial, no delay should be allowed: but, on the other hand, if such question depended upon nice points of law, the trial ought not to proceed till after these shall have been fixed by the proper civil court; and so it was determined, Feb. 10. 11. 1669, Alexander Hume; Aug. 2. 1665, Mr James Row. In this case a variety of points of law fall to be discussed; such as, the power of the British Linen-Company to issue notes, transferable by simple delivery from

from hand to hand, and payable to the bearer on demand; by what the obligation on the company to pay the notes is constituted, whether by the subscription of the manager or accountant, or by appending of the company's seal.

Obj. II. A private party here is prosecuting by way of indictment; which is incompetent, but at the instance of the Advocate alone. A private party ought to raise criminal letters, which pass upon a bill; as thereby the court has an opportunity to judge of the propriety of the accusation.

Ans. Where the person to be tried is in custody, indictment is a more proper mode of accusation than criminal letters; for these suppose him to be at liberty, and therefore give authority to cite him to find caution within six days for his appearance. The Advocate is here a prosecutor; and, at any rate, the trial may proceed at his instance: but it is a mistake to suppose, that an indictment does not require a bill. In many cases, trials have proceeded at the instance of private parties by way of indictment; Feb. 8. 1697, Macculloch, [See N^o 13.]; July 1738, Young; July 1742, Samuel; July 1750, Malloch, [See N^o 58.]; Nov. 1751. Normand Ross.

Replied, In the cases quoted by the prosecutor, no objection was made to the form of procedure by the pannels: the question is therefore entire; and it is clearly for the pannel upon pure and abstract principles.

From the 4th book of *Reg. Maj.* it appears, that anciently the primary right of criminal prosecution was in private parties; and it was only in case of their not exerting it that the crown could take it up. The method of private prosecution was therefore fixed. The accuser set forth his charge, and found caution to follow it out. The person accused was admitted to bail, excepting in the case of murder; if he did not find bail, he was committed, and a day fixed for his trial. This is much the same with the procedure at present upon criminal letters.

The *Reg. Maj.* gives no precise account of the manner of a prosecution at the instance of the public. By *Quon. attach.* the accuser must

must begin by procuring an attachment ; after which, he is allowed to give a summons upon fifteen days.

Prosecutions were first reduced into regular form by *stat. Alex. II.* which introduces indictments, and forbids any person to be arrested by the King's servants unless he be first indicted. But these indictments were not proper actions at the instance of the King or Advocate; they were no more than accusations before the justiciar, upon an inquisition made by a jury, consisting of the chief magistrate of the place, and three reputable persons in the neighbourhood. And immediately upon this the persons accused were attached, and tried in due time before the justiciar by a jury: so that these indictments made no mention of any prosecutor. The accusation was produced upon inquiry made by the court; and being grounded upon a verdict, it entered in some measure into the record in its original state; upon which a note was made out by the Justice-Clerk, and delivered to the pannel, without any precept from the court to that purpose, or any form of execution, *Mackenzie, part 2. tit. 19. § 1.* Accordingly in the old statutes, the Justice-Clerk, who, prior to 1663, had no vote in the court, is mentioned as the person who had the direction of indictments, or dittays, as they were then called. See *Statute-Law abridged, voce Justice-Clerk.*

By act 1587, c. 82. commissioners were appointed for taking up dittays; but indictments proceeded as formerly; and accordingly, in the case of *Macculloch contra Gordon*, Dec. 5. 1666, it was found, That an indictment of treason needed no solemnities of execution, but might be delivered by the Justice-Clerk's servants. And in the form of an indictment in *Mack. Crim.* no mention is made of its proceeding at the instance of the King's Advocate.

By act 1587, c. 77. a power of prosecution is for the first time given to the Advocate; chiefly, it would seem, *in commodum fisci*: but it is plain from the words, that no greater power was given him than what was formerly vested in private parties, viz. a power to prosecute by criminal summons. The word *pursue* is used both in the

rubric

rubric and body of the act, and that word is always applied to procedure by fummons.

On this footing matters continued, until 8^o *Anne*, the Advocate and private parties always pursuing by criminal letters, and indictments only being raised upon report from the commissioners for taking dittays in the several counties; which, when returned into the court of justiciary, were put into a roll, to be called at the circuits, for trial of the crimes therein contained, and got the name of *the porteous roll*: for anciently, circuits were held over the whole kingdom, Edinburgh not excepted, the court of Justiciary being entirely itinerant; and even so late as the reign of James VII. a circuit-court was held at Edinburgh.

By 8^o *Anne*, c. 16. the former method of taking up dittays was abolished. Crimes to be tried at the circuits, were ordered to be inquired after by the justices of the peace on certain days of the year; and the evidence was to be transmitted to the Justice-Clerk, or his deputies, at Edinburgh, at least forty days before holding of the circuits, to be given by him to the King's Advocate, that indictments might be raised as formerly.

Indictments therefore at the circuits continue on the ancient footing; with this difference, however, that they are drawn up, not by the Justice-Clerk, but by the King's Advocate; who having been in use to prosecute by criminal letters, which always proceeded at his instance, has assumed the privilege of inserting his instance in indictments made out by him in consequence of this act.

It is plain, however, the legislature understood there was a material difference between indictments and criminal letters; for the last clause in it provides, That nothing should restrain the Advocate, or any person, "to inform and prosecute any criminal action or cause before the circuit-court, in the same way and manner as is in use to be done before the justiciary-court at Edinburgh."

Upon this act it is to be observed, *first*, That all procedure at the circuits had formerly been by indictment *2dly*, That indictments were in consequence of presentments from the commissioners of dittay.

tay. 3^{dly}, That procedure by way of criminal action had been appropriated to the Justiciary at Edinburgh. 4^{thly}, By this act that method of procedure is permitted to circuits. 5^{thly}, That the act having appointed indictments to be made out as formerly by the King's Advocate, it was thought necessary to reserve to him a power of pursuing by way of action; which shows he would have been excluded from it, had the form of prosecution been limited to that by indictment. 6^{thly}, The way of indictment was not permitted to private parties by this act at all; and had it not been for the last clause, they could not have brought criminal causes before circuit-courts.

Indictments therefore were peculiar to the circuits, criminal actions to the justiciary. But after circuits for the Lothians went into desuetude, it is probable that dittays nevertheless were taken up for these counties, which were tried in the Justiciary. By 8^o *Anna*, however, indictments were only to be used upon presentments from counties, to be made within the districts of particular circuits, and for crimes to be tried in these circuits: but though of consequence, no such presentments could be made for the three Lothians, which are not within the bounds of any circuit; yet the practice of trying by indictment within these counties was erroneously continued, probably from that method not being so troublesome as criminal letters. But this error has chiefly taken place where the Advocate was prosecutor: private parties may have done the same in a few instances; but these cannot subvert all the ancient and established forms of criminal procedure. And, upon the whole, there seems good reason for maintaining, that private parties cannot prosecute by way of indictment, and that neither can the Advocate himself, unless upon presentments for crimes to be tried at the circuits.

As to the alledgeance, That even indictments require a bill, *Mac-kenzie*, part 2. tit. 19. lays down the contrary in express terms. And though letters of diligence are applied for by bill, in order to execute an indictment, yet the indictment is not ingrossed in that bill; whereas in the bill for criminal letters, the whole charge is recited verbatim:

verbatim: so that the court has an opportunity of considering the grounds of the prosecution. Besides, by act 1579, c. 78. when criminal letters are taken out, the Advocate himself, as well as private parties, must find caution to prosecute; but that is not required at issuing indictments.

It is true, in this case, the Advocate prosecutes as well as a private party; but that does not take off the objection. For, in the *first* place, From what has been already stated, there is great reason to dispute even the Advocate's power to prosecute by indictment, but before circuits. *2dly*, There is no evidence the Advocate could have brought the pannel to trial, had no private prosecutor appeared. If, therefore, the indictment is incompetent to the private prosecutor, no procedure can follow; and accordingly in the case of Patrick Gordon above mentioned, who was tried for forgery at the instance of Thomas Duncan and the Advocate, the court sustained the defence, That the private prosecutor had disclaimed. *Lastly*, Whatever the pannel's fate may be, he has a right to insist, that the prosecution shall no longer be carried on against him in the name of a company, to whom it is incompetent to bring him to trial in the way they have thought proper to attempt.

Obj. III. It is essential to the crime of forgery, that the deeds or writings said to be forged be obligatory in law. But the notes of the British Linen-Company are not.—It is needless to state the argument upon this, as it went to the court of session. For

The court of justiciary pronounced the following interlocutor, Feb. 11. 1765. “ In respect of the peculiar circumstances of this case, find, That it is *inexpedient* to go on in this trial before this court *prima instantia*, and therefore dismiss the process; leaving the prosecutors to try the pannel for the crimes libelled before the court of session as accords.”

At. Montgomery.

Alt. Crosbie, Wight, Cosmo Gordon.

N. B. Baillie was afterwards tried before the court of session; who did not remit him to the justiciary, but themselves inflicted an arbitrary punishment upon him.

N^o 74.

June 1766.

Sir JOHN GORDON of Invergordon, Supplicant.

The King's Advocate cannot be compelled to give his instance to a prosecution.

IN November 1758, a petition and complaint was presented to the court of session by Mackenzie of Brae, and others, members of the town-council of the borough of Dingwall, in terms of the statutes of the 2d and 16th of the late King, setting forth, That the election of magistrates and counsellors for that borough at Michaelmas 1758, had been brought about by bribery, and other unlawful means, employed by Colonel John Scot and his agents; and therefore praying the court to void the election made by the pretended majority, and to declare that of certain persons voted for by the complainers, &c.

In the answers to this complaint, it was alledged, That practices of a like nature with those complained of had been used by a certain gentleman who stood candidate in opposition to the Colonel. Upon this Sir John Gordon appeared by his counsel, and desired a proof at large might be allowed to the respondents of these articles.

A proof was accordingly allowed to both parties, Aug. 8. 1759; and, upon advising it, the Lords found, "That the election made
" at Michaelmas 1758 by the persons complained on, was brought
" about by means of bribery and corruption; and therefore found
" the same void and null, and reduced, decerned, and declared accordingly; but refused to declare the persons voted for by the
" complainers to be legally elected magistrates of the said borough
" of Dingwall; and found Colonel John Scot, Kenneth Bain of Tulloch, Kenneth Mackenzie, and Andrew Robertson, conjunctly and severally, liable in the full costs of suit."

Afterwards a petition was given in to the Lords, Aug. 9. 1759, praying for penalties against the Colonel, and the three other persons

sons mentioned in the interlocutor; and a doubt being started, whether the penalties could be awarded upon a summary complaint? to remove that, a suppletory action of declarator was brought, to be conjoined with the proceedings on the complaint.

This action, to which the Advocate gave his concurrence, was founded upon the common law as well as the statutes; and after specifying the various acts of bribery and corruption alledged to have been proved, it concluded, That the four gentlemen above mentioned, and four more, "all of them actors and associates in
"this scene of corruption, had thereby incurred the penalties and
"disabilities contained in the foresaid act of the 2d of his late Ma-
"jesty, or at least, upon the common law of the realm, they had,
"by their said offences, forfeited and lost their right of burghership,
"and should be disabled from electing, or being elected, into trust,
"office, or franchise, in the said burgh; and that they should be fi-
"ned in the sum of L. 500 Sterling each for their said offences, and
"otherwise punished for the sake of public example."

The defenders objected both to the competency of the action, and title of the prosecutors: and after a hearing in presence, and informations, the Lords found, Jan. 13. 1762, "the action not compe-
"tent before this court; and therefore dismissed the same." The judgement proceeded chiefly on this, That it was a fundamental part of the constitution, to preserve the jurisdiction of the civil and criminal courts separate and distinct; and that the people of this country ought to be tried for crimes and offences, especially those of a political nature, by a jury, which they could not have before a civil court. The judgement was affirmed by the House of Peers, March 14. 1763.

Sir John Gordon after this insisted, That the Advocate should bring a criminal prosecution, at his instance, against the gentlemen above mentioned, which his Lordship declined. After various conversations and messages between them, Sir John, April 14. 1763, made a written requisition to his Lordship, insisting, That he should not only give his concurrence or concurrence to a prosecution before the court of justiciary against these gentlemen, to be raised by Sir

John, but also his instance. His Lordship returned this answer in writing. "I will not prostitute my office to serve the purpose of private resentment. When the criminal libel was brought in the court of session recently after the crime was committed, the pursuers, by advice of their counsel, asked no more than the concurrence of the King's Advocate for the time, that being sufficient for all the purposes of private and public reparation. At this distance of time, I will not adopt the action at my own instance. I will give my concurrence to any criminal libel brought by a party having interest to pursue."

Afterwards Sir John made another requisition to the Advocate, July 4. 1764, desiring to know, whether his Lordship would concur as a prosecutor along with him? or, in case his Lordship declined concurring as a prosecutor, would he adhibit his concurrence at Sir John's instance solely? and did his Lordship understand, that by giving such concurrence to Sir John, he gives it to a person having a proper title and interest? his Lordship would explain what is meant by the concurrence he offers, and what benefit Sir John would derive from it. To this his Lordship answered verbally, That he had already signified his resolution in writing; that Sir John's lawyers would explain to him what is the meaning of the Advocate's concurrence, and what the effect of it would be in the present case.

Upon this Sir John preferred a petition to the Lords of Justiciary, praying their Lordships to appoint it to be served on his Majesty's Advocate, and him to give answers thereto on such notice as may seem proper; to find, That he has done wrong in refusing his instance to the prosecution demanded; and in consequence thereof, to make such order as to their Lordships should seem just.

In support of this demand, the petitioner, after stating the facts and some observations, in the course of his narrative * argued thus.

"The petitioner apprehends, that although, by the established forms

* These are inserted verbatim, and animadverted upon, in the answers for the Advocate.

of criminal procedure in this country, no prosecution can be carried on without the intervention of his Majesty's Advocate, either prosecuting at his own instance, or concurring in the prosecution of a private party; yet where-ever a relevant information is exhibited to his Lordship by any private person, where sufficient evidence is offered of the facts contained in that information, and the prosecution offered to be carried on without any expence to the public, his Lordship cannot, arbitrarily, withhold the assistance of his office, in either of these shapes, according as the nature of the offence shall demand; and that if he does so, without sufficient reason, it is competent to your Lordships, as being the supreme judges in all criminal matters, to interpose your authority. It is with this view that the present application is now made to your Lordships, that you may interpose your authority *effectually*, so as to prevent a criminal action of so general and constitutional a nature from being eluded, merely by the King's Advocate's withholding his instance, which the petitioner apprehends he is in *duty* bound to give.

If it is law, that his Majesty's Advocate, upon a *pointed* information of a crime given in to him by a private party, who not only condescends upon proper evidence, but likewise offers to be at the whole charge of the prosecution, may, nevertheless, by a simple *non-lumus*, prevent that prosecution altogether; the petitioner must be forgiven to say, that in point of police and public justice, the constitution of this country, so happy in other respects, is *miserably defective*. Custom, during a long period of years, seems to have established it as law, that the title to pursue in prosecutions for crimes of a public nature, is vested, in this part of the united kingdom, in his Majesty's Advocate; and the petitioner can scarce doubt, that such is the law, after the opinions he has received on that subject, and what he has heard advanced, both at the bar of the court of session, and in the House of Lords, in the course of the proceedings which were the consequence of the Dingwall elections in the year 1758. Certain, however, he is, that if such a title is vested in others, it is to be exercised with the utmost difficulty, and, being liable
to

to many objections, must be vindicated by a tedious and expensive litigation. But such being the law or practice, it becomes a question of the utmost importance to this country, how that title to prosecute for public offences, which is vested in his Majesty's Advocate, may be used.

The laws of both parts of the united kingdom have *long* denied a dispensing power to the crown. In Scotland, the claim of right is explicit in declaring, that, to assert an absolute power to pass, annul, and disable laws, is contrary to law. Yet if the King's Advocate, while he possesses the *title* to pursue in crimes of a public nature, may refuse his instance, while a pointed information is exhibited to him of such a crime, such an absolute power of disabling laws, does actually exist in that officer, though disclaimed in the most general terms in the claim of right.

The petitioner, therefore, cannot permit himself to suppose, that his Majesty's Advocate can refuse his instance in such a case; at least if he does refuse it, he apprehends it must be on a cause assigned, and that the propriety of such cause is somewhere cognisable by legal procedure: and he can suppose it cognisable no where else, but in that court which is competent to try the action itself, where such instance is demanded; for he understands it to be a most general principle, That where a jurisdiction resides, every power necessary for explicating that jurisdiction resides also, according to the opinion of *Javolenus*, l. 2. ff. *De jurisdictione*: "Cui jurisdictionis data est, ea quoque concessa videntur, sine quibus jurisdictionis explicari non potuit."

Accordingly your petitioner is informed, that it is not without precedent in this country, for a court of justice to interpose in determining the propriety of the conduct of his Majesty's Advocate in the exercise of his office, and where he has refused to lend his official aid, when required, on just cause, to compel him to give that aid. Thus, in the court of session, Sir Thomas Hope, while King's Advocate, having refused to subscribe two bills of improbation at the instance of the Earl of Abercorn, and James Inglis of Inglisfoun, (though

(though he assigned a cause for his refusal, viz. That the King had an interest to defend in those very actions), was ordained to subscribe the bills. Nor did the court rest satisfied with determining this particular case, but made a general order concerning the duty of the King's Advocate in all similar cases, by their act of sederunt, of date the last of January 1633. And this precedent is the more remarkable, that it happened at a time when matters of prerogative, and the powers devolved by the commission of the crown on all its servants, were carried farther, and insisted on more strenuously, than they can be in later times, since they have been better ascertained.

Your Lordships, therefore, as the supreme judges-ordinary in criminal matters within this part of the united kingdom, and of consequence judges competent to all crimes, of whatever denomination, committed in Scotland, must possess the same power with respect to criminal actions, that the court of session possess with respect to actions competent before them; and his Majesty's Advocate must of consequence be amenable in this court, with respect to his conduct concerning the exercise of his official instance in actions of a criminal nature. If he has improperly refused that instance, when required openly and in a legal form to give it, your Lordships will ordain him to issue an indictment, or to subscribe a bill for criminal letters, in the same way as the court of session ordained Sir Thomas Hope to subscribe bills of impropbation; and if he shall alledge, that he had cause for refusing his instance, your Lordships will ordain him to show such cause, and will judge of the validity of it when shown.

Unless such a power resides in your Lordships, the office of his Majesty's Advocate is of the *most dangerous* nature to the constitution, and may be a mean of subverting many of the most valuable laws, and most excellent regulations, with respect to police and public justice, this nation is possessed of, and which our ancestors were at the utmost pains to provide. They denied to the crown a power of disabling laws; but that power may, by means of this officer, be indirectly exercised. And though they allowed to the King the prerogative

tive of mercy in pardoning criminals; yet the exercise of that prerogative they laid under such restrictions, that it never could prove disadvantageous, or totally interrupt the course of public justice. Thus, in some cases, that prerogative could not be exercised at all, as in act 1563, cap. 62. and in act 1540, cap. 118. And in no case could the benefit of a pardon be claimed, without a direct acknowledgement of the crime; and even then it was ineffectual, till an assythment to the private party was either paid, or caution found for it. Nor, in any of these cases, could the remission take off the infamy, if the crime was a *crimen infamans*, and inferred an *infamia juris*, and incapacity of public office. But if the King's Advocate may thus indirectly pardon, by refusing his instance to a prosecution, all these salutary laws are eluded, the grossest crimes may for ever remain unpunished, private parties can have no claim for an assythment, and the criminal may escape without even incurring that infamy which the law has indelibly affixed to those who are guilty of gross transgressions.

Even in crimes where there is a private party having a title to pursue, with concurrence only of the King's Advocate, which is never refused to any one; yet the privilege claimed by the King's Advocate, of arbitrarily refusing to pursue at his own instance, without assigning any sufficient reason, and without allowing his conduct, in so doing, to be cognisable by any court, might be attended with very serious consequences. The crime to be tried may often be of an occult nature, and the private party intitled to pursue, perhaps, himself the most material evidence. In such a case as this, the refusal of the King's Advocate to pursue at his own instance, would not, indeed, have the effect, as in public crimes, of preventing a trial altogether; but it would very possibly have an effect a great deal worse, that of stifling the evidence, and thereby securing impunity to the offender.

Such being the consequences of the power supposed by his Majesty's Advocate to be inherent in his office, the matter seems to deserve the most serious attention of your Lordships, and of the country

try in general; nor could the petitioner, as a native of this country, and a well-wisher to its constitution, (had his direct interest in the matter in issue been smaller than it is), have omitted to bring it to trial, without accusing himself of some neglect, in not endeavouring to ascertain, during these times of liberty and public tranquillity, a point which might prove of the utmost importance in precedent, if, in some future period, as in past times has happened, a blow should be aimed at the public liberty, or the personal security of the subject.

The petitioner is aware, that he may be blamed for not bringing this matter sooner to trial; but some of the reasons of delay have already been explained. A variety of other obstructions have, from time to time, occurred, which have retarded this application to your Lordships. The petitioner would have reckoned it extremely fortunate, if he could, by that means, have removed the necessity of making any such application at all. Perhaps the delay might have been still greater, had he not been *roused* to insist, from seeing, that such offences were becoming more prevalent, from the prospect of impunity; and that from those already committed not being brought to trial, he was *likely still farther* to suffer, from a repetition of the same offence.

Upon the whole, he does humbly contend, That it was the duty of his Majesty's Advocate, to have given his instance to a criminal prosecution, on account of the bribery and corruption practised in the course of the Dingwall elections in the year 1758; and that, having refused to do so, he ought to be ordained by your Lordships, either to issue a proper indictment, or subscribe a bill for criminal letters, for bringing that offence to trial.

May it therefore please your Lordships, to appoint this petition to be served on his Majesty's Advocate, and him to give answers thereto, on such notice as may seem proper; to find, that he has done wrong in refusing his instance to the prosecution demanded; and, in consequence thereof, to make such order as to your Lordships shall seem just."

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When this petition was moved, the court did not seem to think it required any answer on the part of the Advocate, and no order was made upon him for answering: however, after some time spent in searching the record for precedents, his Lordship thought it his duty to put in answers.

In these answers it was argued for the Advocate,

“From the latter part of the petitioner's conduct, since the 4th July 1764, the respondent must presume, that he has been advised by his counsel, that he neither had a proper title nor interest in his own person as a private party, nor could procure any other person having such interest to carry on the prosecution. And indeed there seems to be too much ground for believing, that this was the original reason of his pressing the respondent so much to adopt the prosecution at his instance, for his Majesty's interest. For by the statutes of the 2d and 16th of Geo. II. upon which his criminal libel in the court of session was laid, the offence of bribery and corruption is described, and certain pecuniary penalties and disfranchises are imposed; but under a limitation, that no person shall be made liable to these penalties and disfranchises, unless prosecution be commenced, within two years by the first statute, and one year by the last.

In this view of the case, Sir John can be considered in no other light, than if he had given a private information to the Advocate, supported by sufficient proofs, that the offence of bribery and corruption had been committed five or six years ago in the election of magistrates and counsellors of any borough in Scotland. In such a case, can it be maintained, that, after this supposed bribery and corruption had been so long known to every party interested, and when no private prosecutor did, or could appear, by reason of the limitations of the statutes, it was the duty of his Majesty's Advocate to have adopted such prosecution at the King's instance? Can Sir John say, that he is advised by his counsel of any instance or precedent of such prosecution? Can he give it as their opinion, that such prosecution for offences on statutes which limit the action to one or

two years, would have been competent at the instance of his Majesty's Advocate? Would it not be most alarming to the commons of this kingdom, if such prosecutions, which respect the elections of members to parliament, and are so much mixed with politics and party, should be found competent at the King's instance for the course of forty years? In the particular situation in which the respondent stood, as the private counsel of Sir John Gordon, would it not have carried the strongest appearance to the world, and to Colonel Scot, that he had prostituted the power of his office to the political resentment of a client? Would Sir John's professed zeal for the constitution have protected the respondent from the highest censure for such a conduct? For if it is in the power of an Advocate, or Attorney-General, upon private informations, to rake into election-matters, and to bring criminal prosecutions for bribery and corruption at the King's instance, where-ever, and against whom, they think proper, at the distance of many years, after all parties interested had acquiesced, or, which is the same thing, had fallen from their title and interest to pursue, by the limitations in the statutes in that behalf; if these things are in the power of an Advocate or Attorney-General, the consequences would be indeed alarming to every lover of the constitution; and the prerogative of the crown, so used by its officers, would prove an engine in matters of election, more dangerous to the independency of parliament, than any yet hitherto apprehended.

Moved by such considerations, could the respondent act in any other way than he did? He refused to adopt the prosecution at the King's instance, but he left it to Sir John, or any other private party, who should be advised that they had a proper interest, to prosecute the bribery and corruption, either upon the statutes, or at common law: and at the same time he offered his concurrence; which, supposing the action to be competent, was equally sufficient for obtaining all the ends of private and public reparation, as if the prosecution had been at the instance of the Advocate for his Majesty's interest: Nay more so, because, in the first case, the private party

interested would have been matter of his own action, and intitled to the penalties, costs, and damages; which could not have been the case if the prosecution had been carried on at his Majesty's instance.

The petitioner says, That the respondent's refusal to adopt the action at the King's instance, was an absolute denial of the aid of his office, in the only shape in which it could be effectual to the petitioner to insure a trial; for that he well knew, that, in the criminal action, when brought before the court of session, one of the strongest defenses insisted on for the defenders, was the want of a proper title in the pursuers to carry on such action at their instance, with concurrence only of the King's Advocate; and that it was then strenuously maintained, that bribery was a public crime, which no private person could pursue; and consequently, that it could only be prosecuted at the instance of his Majesty's Advocate *ad vindictam publicam*.

The respondent was not present in the court of session when that action was argued. If the plea here mentioned was insisted in by the defenders in that process, he might say, it was an absurd one: for though all crimes are *public*, and may be pursued in *vindictam publicam*; yet, in so far as private parties are hurt or injured thereby, the prosecution is competent to them, with concurrence of his Majesty's Advocate: and the prosecution for bribery and corruption is so far from being considered as *peculiar* to his Majesty's Advocate *ad vindictam publicam*, that, on the contrary, the statutes above referred to declare it a *popular action*; and further declare, that the penalties may be recovered by any person who shall inform, and sue for the same. And if it shall be supposed, that those statutes do not supersede the prosecution of this offence at common law, still it is clear, upon every principle in the common law, that any party hurt or aggrieved by such offence, may pursue the action with concurrence of his Majesty's Advocate, for private and public reparation. And accordingly it appears, that the court of session paid no regard to this plea in the criminal action that was brought before them, but dismissed

missed the action as not competent to their jurisdiction. At any rate, before Sir John exhibited this complaint against the Advocate, he ought to have brought this action, with the concurrence offered, which neither would have occasioned expence nor delay; and if it was dismissed as not competent to a private party, then he would have had better ground to have returned to the Advocate, and demanded, that the prosecution should be carried on at his instance.

He says, "That the offer of concurrence was not made to Sir John nominatim, but to any person having interest; so that it remained doubtful, whether the respondent ever meant to grant his concurrence to Sir John, as a party having a proper title to pursue."

But whose fault is it that this point remained doubtful? Did the Advocate ever refuse to take the nature of Sir John's title under his consideration? or did Sir John ever present any libel to him for his concurrence, or show him the opinion of any lawyer, that such libel was competent to him? Sir John having expressed some diffidence of his own title, if the Advocate had limited his offer of concurrence to Sir John himself, it might have been ineffectual; but he intended no limitation upon the right of any private party whatever, and therefore offered his concurrence to any party having interest to pursue.

The petitioner says, "He thinks it is his duty still to insist, that the persons guilty be brought to trial before this high court; for that, without such trial, every candidate may scatter bribery and corruption among the electors with impunity."

This is a very extraordinary proposition, when the statute-law of the realm has enacted such severe penalties against that offence, and has given the action to any person who shall sue or prosecute within the time limited by the statute. If the private parties interested neglect such prosecution, the King's Advocate cannot bring it upon the statute. *He doubts much whether a prosecution would afterwards be competent to him at common law. He does not know what the nature or conclusions of that prosecution ought to be, because he can discover no example or precedent of it; and, at any rate,*

rate; he is sure, from the considerations already suggested, that, by such a precedent, he would turn his office into an engine of power in influencing elections; which no friend to the liberties of this country would wish to see.

The petitioner lays down the form of criminal procedure in this country; and very justly observes, "That no prosecution can be carried on without the intervention of his Majesty's Advocate; either prosecuting at his own instance, or giving his concurrence to the prosecution of a private party; and that he cannot arbitrarily withhold the assistance of his office in either of these shapes, according as the nature of the offence shall demand; and that if he does so without sufficient reason, your Lordships will interpose your authority."

The respondent hopes he never will do any thing arbitrary; but he must execute his office according to his oath, and to what he apprehends to be his duty. The petitioner's own proposition does admit, that the respondent has done nothing arbitrary in this case, because he always offered his concurrence to any private party having interest to pursue; and it is not alledged, that he refused to adhibit that concurrence to any libel proffered to him, in the name of Sir John Gordon, or of any other person.

But the petitioner, departing from his own fundamental proposition, attempts to maintain, "That any private informer of a crime, offering sufficient evidence in support of his information, and to pay the expence of the prosecution, has a right to demand of the King's Advocate to prosecute that crime for his Majesty's interest; and that if he refuse, upon complaint, your Lordships may compel him to carry on such prosecution."

To the respondent this is a very new doctrine; and he believes that it will appear equally new to your Lordships. He cannot think it is the opinion of any of the learned counsel who sign the petition: if it were, they certainly would have been able to have supported their opinion by the authority of some one writer upon our law, or of some one precedent from the records of this court. For the occasions

fions of the compulsory here pointed at, if it had been understood to be competent, have been innumerable. The respondent, after looking into all the books of the law, and the records of this court, cannot find the least foundation for what is here maintained by the petitioner. It appears to him to have a direct tendency to transfer the *vindicta publica* from the King, and the officer of the law intrusted by him, to every private informer in the first instance, and to your Lordships ultimately by way of review. There is nothing more fixed in the law of this country, than that the prosecution of all crimes *ad vindictam publicam* belongs to the King, and to his Advocate, acting by his authority, and for his interest. Hence it is, that all such actions are under his power and controul, to be insisted in, or deserted, as he sees cause. No lawyer of this country has ever suggested the least doubt of the Advocate's power of *deserting the diets* of all actions brought for his Majesty's interest; and no instance appears, or can be suggested, of your Lordships interposing your authority to stop this part of the execution of his office. If then he is master of every such action brought at his instance, and may desert it when he sees cause, how can it be maintained, that any private party can, by your Lordships authority, compel him to take up, and prosecute such action?

By the act 8^o Anne, cap. 16. the justices of peace, sheriffs, and magistrates of royal boroughs, within the respective counties, are severally required to meet twice in the year, in order to receive such informations as shall be offered to them, concerning matters criminal to be tried in the circuit-courts, and to make up particular accounts of such criminal facts happening within their respective bounds, as are to be tried before the respective circuits, containing the names and designations of the offenders, facts committed, with the circumstances of time, place, and others, that they may serve to discover the truth; containing also the names and designations of the witnesses, and writs, that are to be made use of at the trials. These informations are appointed to be signed by the justices, sheriffs, magistrates of boroughs, and their clerks, respectively, and to be transmitted

mitted to the Lord Justice-Clerk, or his deputies, forty days before holding the circuit-courts; that being given to her Majesty's Advocate, or such as discharge that trust in Scotland, libels and indictments may be raised and executed against parties, affizers, and witnesses, according to the form of law and custom.)

" Provided, nevertheless, that nothing in this act contained, shall
 " be construed to restrain her Majesty's Advocate, or his successors
 " in office, or any person or persons, to inform and prosecute any
 " criminal action or cause, in the same way and manner as is in
 " use to be done, before the justiciary-court at Edinburgh."

This is the course of making presentments of crimes for trial in all the counties of Scotland, except Edinburgh, and the two adjacent counties, which are annexed to no circuit, but remain under the jurisdiction of the court of justiciary at Edinburgh. And in these three counties, presentments are made by way of information to his Majesty's Advocate, by the respective magistrates within these counties, from time to time, as crimes occur. And it is well known to your Lordships, and to every person conversant in the law of this country, that these presentments or informations, so transmitted to his Majesty's Advocate, do not tie him down to prosecute every matter so presented as a public crime. It would be attended with the most disagreeable consequences to the subjects, if every such presentment or information behoved necessarily, and without any controul, to pass to a criminal indictment. But it is well known to your Lordships, that the law and constitution of this part of the united kingdoms, established by immemorial usage, has vested that controul in his Majesty's Advocate; who, after examining the presentments or informations, and the evidence upon which they are founded, may either raise his criminal libel or indictment thereupon, for his Majesty's interest, or refuse such prosecution, or, by following a middle course, leave the same to be tried before the inferior courts, as the nature of the case, and the evidence laid before him, may require.

Such refusal to prosecute upon presentments or informations by the inferior magistrates, occurs every day; but no one ever heard,
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that inferior magistrates had a right to insist, that his Majesty's Advocate should prosecute, and, in case of his refusal, to apply to your Lordships, to compel him to undertake such prosecution: and surely Sir John Gordon, as a private informer, can have no better right to make such demand upon the Advocate, or your Lordships, in this case, than a sheriff, justice of peace, or magistrate of a borough, has in the other case.

And indeed the petitioner's doctrine would introduce a train of consequences very new and extraordinary in the law of Scotland: for if your Lordships have power, upon the suggestion of a private informer, to order the King's Advocate to prosecute for his Majesty's interest, it must necessarily follow, that, upon the like suggestion by any of the subjects against whom such prosecution is commenced, your Lordships would have the like power to order him to *desert the diet*, and desist from such prosecution. Such a doctrine would, of necessity, introduce a new course of procedure before this court, unknown in the law, and unknown to us and our ancestors. Your Lordships can only judge upon a criminal libel or indictment, brought before you by a private party having interest, with concurrence of the King's Advocate, or brought at his instance for his Majesty's interest; but you have never in any instance exercised a power of judging in a previous plea, concerning the propriety of the Advocate's insisting in, or refusing to insist in any libel or indictment. In such previous trial, the court behoved necessarily to enter into the consideration of the nature of the crime, the import of the evidence, the credibility of the witnesses, and the whole other circumstances of the case, and all this when the defender is not present. And thus you would in effect pronounce judgement in the cause, before there was indeed a cause depending. Trials by precognition were in some cases practised by the privy council of Scotland, but are expressly prohibited in the commission erecting the court of justiciary into its present form; *Sir George Mackenzie*, tit. *Jurisdiction of the privy council*, par. 6. In short, the course of criminal procedure resulting from the petitioner's doctrine, behoved

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necessarily to transfer the conduct of prosecutions in *vindictam publicam*, from the King, and his officer, to your Lordships; which you cannot desire, because it is contrary to law, and in no respect necessary for the public interest.

The petitioner talks of the powers of the Advocate's office, as implying a power to dispense with the laws, contrary to the claim of right. The respondent venerates the claim of right as much as the petitioner does; but the petitioner will find no such power contained or implied in the nature of the office of Advocate, as above explained. The King's prerogative, in prosecuting all crimes in *vindictam publicam*, and the powers of the public officer to whom he commits the conduct of such prosecutions, is part of the public law and constitution of this part of the kingdom. These powers cannot be arbitrarily exercised by that officer: he holds his office during the King's pleasure; and, upon a complaint against him for abuse committed in his office, presented by any of the subjects to the King in council, he may be dismissed from his office, and redress may be obtained against every sort of wrong which he is capable to commit, whether from ignorance, or from a wilful transgression of his duty. But as there is no instance upon record, of your Lordships interposing in the manner prayed for in this petition; so the respondent apprehends, your Lordships will not incline to assume such powers. Many instances have occurred in this court, as well as in the courts of session and exchequer, of recommendations to the King's Advocate to prosecute particular offences, arising or falling occasionally under the observation of the judges in the course of their other procedure; and due attention has always been, and will always be paid to such recommendations: but no instance occurs upon the records of any of those courts, of such prosecutions being ordered by authority of the courts. If it is proper that the office of Advocate requires to be limited in its legal powers, this can only be done by authority of parliament; and whenever the subjects find that these powers are abused, they will not be so far wanting to themselves as not to seek for such redress.

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The petitioner quotes the act of federunt, 31st January 1633, *Anent the Advocate's concurrence in improbations*; where the court of session interposed, in a case where the Advocate had refused to give his concurrence to two bills for raising summons of improbation and reduction, at the instance of the Earl of Abercorn and James Inglis, against their vassals, "and ordained the Advocate to subscribe the said bills, according to the general order and practick observed in this judicature."

The process of improbation and reduction is in its nature a civil action, essential to the security of the land-rights and title-deeds of the subjects; and though it may consequentially bring on a trial of actual forgery, that could be no reason for the King's Advocate's denying his concurrence to a general process introduced for the security of the whole subjects. How this can apply to the present case, is submitted to your Lordships. Here the concurrence of the Advocate, instead of being refused, was proffered; and the complaint now offered against him, is, that he would not go further, and prosecute the action in his own name at his Majesty's instance.

The petitioner says, That in crimes of an occult nature, the private party intitled to pursue, may himself be a material evidence; and unless the King's Advocate pursue at his instance, the criminal may escape. If, in such case, the Advocate should refuse his *instance* when his *concurrence* would be ineffectual, and thereby suffer occult and heinous crimes to remain unpunished, it might well be urged, that there lay a sufficient cause of complaint against him to the King in council; but the petitioner puts an imaginary and improbable case, in order to shew the necessity of a new and unprecedented remedy. The petitioner cannot pretend that this observation applies to his case. There were no less than three complainers in the criminal libel exhibited in the court of session. Sir John, by his last requisition, seems now to offer himself as the private prosecutor; any one is sufficient; none of them are necessary witnesses; and he states the evidence in his petition to be as clear as sun-shine; so that there

could be no reason for the Advocate's adopting the action at his own instance, from any such apprehension as is here suggested."

Sir John gave in a reply, in which it was argued as follows:

"The respondent is at great pains to misrepresent the nature of that criminal action in which he is desired to give his instance by the petitioner. He supposes, that it must be founded on the statutes of the 2d and 16th years of his late Majesty; and having laid this down as a *postulatum*, he next tells your Lordships, that such an action is already prescribed; and he descants upon the evil consequences that may be supposed to ensue from an officer of the crown intermeddling in matters relating to elections, and bringing criminal prosecutions, on account of such matters, at a distant period of time after the election, in the course of which the crimes are said to have been committed. In none of his positions, however, on this head can the petitioner agree with him.

For, in the *first* place, The statutes of the 2d and 16th of his late Majesty, do not, in any shape, concern such bribery as the petitioner wants to bring to trial. These statutes punish bribery only in the case where it is committed in the election of a member of parliament, or in the election of commissioners from boroughs to chuse a member to serve in parliament; but they do by no means punish bribery committed in the election of magistrates and counsellors of royal boroughs: that is left to the common law, which, as it holds bribery to be a crime, will not permit it to escape unpunished.

And, in the *second* place, Though the crimes which the petitioner wants to bring to trial, should be such as might be found punishable by the statutes of the 2d and 16th of the late King; yet still, their being punishable, in certain circumstances, by statutory penalties, will not derogate from the common law, which hath declared them crimes, and by which they are punishable, independent of any statute. The statutory prescription may take away the statutory action. Thus, by those statutes, a pecuniary mulct is inflicted on bribery, and an action is given *cuiuslibet e populo*, for recovery of that mulct,

mulct, to be applied to his own private use, either by an action in the court of session, or a prosecution in this court: and certain incapacities and penal consequences are declared to follow upon conviction. Now, though the statutory prescription may operate so far as to take away the action before the court of session, and also to take away the right of a private prosecutor to the statutory mulct, and every other statutory peculiarity; yet, as nothing appears in those statutes that can derogate from or repeal the common law, it still remains competent to the public prosecutor, to insist for punishment of the crime of bribery, upon the common law, before the proper criminal court.

And had the action that is proposed to be brought been to be laid on the statutes of the 2d and 16th of his late Majesty, neither the instance of the King's Advocate would have been necessary, nor was it requisite the action should be brought in this court; it would have been a popular action, and was competent in the court of session: and could the suppletory action in the court of session have been founded on those statutes, no plea would have lain to the jurisdiction of the court.

The respondent does, indeed, seem to suppose, that the common law has enacted no punishment against the crime of bribery. In that, however, the petitioner cannot agree with him; nor does he presume your Lordships will at once assent to so strange a position. The crime of bribery has been known almost in every state, as early as magistracy has been firmly established: it hath ever been reputed one of the grossest malversations in office, that either a magistrate, or those who have been invested with the power of bestowing magistracy, can be guilty of; and among the Romans in particular, from whom we have borrowed what we call our common law, with respect to crimes, the *crimen ambitus* was well known, and severely punished; and the petitioner has little doubt, but that, upon an accurate discussion, your Lordships will find, that this crime, together with others, has been transferred from their law to ours. The favourers of arbitrary power, indeed, have endeavoured to support

port the contrary opinion; and Sir George Mackenzie, partial to the principles and practices of an administration under which he served, hath, in his Institutions, book 4. tit. 4. § 20. said, that "*ambitus*, or the obtaining offices by unjust means, is not punishable under monarchy." Yet the same author, in his Criminals, speaks a very different language; where he can find *termini habiles* for laying this accusation, so as not to touch the practices of those whom his general position above mentioned was meant to screen. He says, "The Romans, considering how destructive those were to the commonwealth, who endeavoured, by all indirect means, to screw themselves into public employments, did therefore make this indirect dealing to be a crime, and called it *ambitus*; which punished, *lege Julia*, those who gave money for making themselves magistrates, or that they might attain to honours. It is commonly thought, that how soon the power was transferred from the people to the senate, and from the senate to the prince, this crime ceased; because the prince, having the sole power of bestowing magistracy and honour, is still presumed in law to bestow them upon those who deserve best; Groneweg. *De leg. abrogat. ad h. t.* But yet I see not why the prince may not justly cause punish those who have wronged both the public interest and his favour, in prostituting both to so unworthy a sale. And since commissioners for parliaments, and *magistrates of towns*, are still elected by plurality of suffrages, I see not why such as bribe the electors, may not be liable to the same accusation. The punishment of this crime was deportation, which was much like our banishment; and in lesser towns it was punished by a fine of 100 crowns, and infamy; and since it is a kind of bribing, I think it should be punished with us as such." And indeed the petitioner has not the least doubt, but that a criminal libel for bribery may be supported, both on the common law, and on our ancient statutes. That, however, is not *hujus loci* to dispute; it is time enough to do so when a libel is actually served, and a proper party is in court; when, if his Majesty's Advocate doubts of the relevancy of such a libel, the petitioner will, if he

he desires it, join to him other counsel, who will endeavour to support it; or even when a bill for criminal letters for such a crime is offered, the petitioner will, if your Lordships require it, endeavour to show cause why such a bill ought to be passed: but in the mean time, it is humbly apprehended, his Majesty's Advocate ought to give his instance to such a bill; nor can he arbitrarily refuse to allow this point to be brought to trial, Whether bribery is a crime by the common law or not?

And with respect to the bad consequences which he supposes may result from an officer of the crown meddling in election-matters, and bringing criminal prosecutions at a distance of time, on account of what happened in the course of elections, the petitioner does acknowledge, that he can by no means enter into the reasonings of the respondent on that head. If bribery is a crime, and a criminal action lies for the punishment of it, that action must subsist at least till cut off by prescription. The petitioner does not here enter into the question, Whether the prescription of criminal actions takes place in the period of forty or of twenty years? *or whether there is any such thing, by the law of Scotland, as a prescription of criminal actions?* It may suffice in the general to say, that no lawyer ever yet pretended, that a criminal action, founded on the common law, can be cut off by prescription, in a shorter period of time than that of twenty years. — If, therefore, it is the duty of his Majesty's Advocate to prosecute at all, it is his duty to prosecute as long as the action subsists; and if it is his duty to prosecute, the prosecution must be carried on indiscriminately, whether the bribery to be punished was exercised in favour of those who were partial to the measures of administration, or those who stood in declared opposition to them. The exercising his duty impartially, and bringing all concerned in bribery to condign punishment, can never be attended with any evil consequences, and may produce many good ones: it is a conduct that must ever be favourable to the liberty of the subject, and the constitution of parliament; whilst the power of refusing arbitrarily an

an official instance, for the purpose of bringing the corrupt to justice, as hath already been shown, may prove fatal to both.

Nor need the respondent be afraid, that in bringing to justice the offenders in the case of the Dingwall election, he would have appeared to have "prostituted the power of his office to the political resentment of a client." For as his client desired no such prostitution, but only called on him to exercise what he apprehended to be the duty of his office; so he, in the execution of that duty, ought to have despised all private obloquy, and, without fear or dread of resentment or calumny, to have attended only to public justice, and the due execution of the law, without distinction of persons.

In short, though the respondent pretends to say, that if he should give way to the demand that is now made, "by such a precedent, he would turn his office into an engine of power, in influencing elections, which no friend to the liberties of the country would wish to see," the petitioner apprehends, that quite the reverse must appear to be the case. His office may be converted into an engine of unconstitutional influence, if he is permitted to exercise it arbitrarily, and without controul of the courts of justice, or to set up a plea, that he is not amenable in them: but if he exercises it impartially on every occasion, when proper materials are laid before him to enable him to bring a criminal prosecution, and under the direction and controul of the courts of justice, instead of an engine of illegal influence, it is no more than a proper mean of legal terror, to prevent men from infringing the public law.

The respondent does indeed say, That he offered his concurrence; which he is pleased to alledge was all that could be asked of him, or that he was obliged to grant; and that by virtue of that concurrence, the petitioner might, if he had a sufficient interest to insist for punishment of this crime, have brought the offenders to justice.

The petitioner will not here enter on a discussion on what might have been the case, had the King's Advocate offered his concurrence to the petitioner *nominatim*; but he would not even so much as say, that

that he would give his concurrence to him personally; and even when such concurrence had been obtained, it still remained to discuss the validity of the petitioner's title to pursue; which was a question too nice to be supposed extricable, without much trouble and great expence. The petitioner had heard this topic much insisted on, when his suppletory action was pleaded before the court of session: He had been there told in the pleadings at the bar, and particularly in a printed information in behalf of Colonel Scot, That nothing less than the instance of the King's Advocate was available to bring the crime of bribery to trial; nor had that point received a decision: though, therefore, his private opinion had been, that he had an interest to pursue, and even though the Advocate had offered to second that interest, by lending his concurrence to him *nominatim*; yet he was convinced, from what he had heard, that the matter was at least so far doubtful, that it might become the foundation of a tedious and expensive litigation; more especially if the dispute should be agitated as an incidental question in the course of a criminal prosecution; and if it should then be determined against them, he would have had the same litigation to maintain that he does now, without any advantage gained.

The respondent is pleased indeed to talk very lightly of this position, That the instance of the King's Advocate is necessary to bring those guilty of bribery to justice, and condemns it as absurd and untenable. He tells your Lordships, that the actions introduced by the statutes of the 2d and 16th of his late Majesty, are popular actions, and require neither instance nor concurrence. But in this, he is endeavouring to lead your Lordships away from the merits of the case in hand. It is not an action founded either on the 2d or the 16th of the late King, in which the petitioner demands his instance; neither of these relate to the crime which he wants should be punished; it is an action at common law that the petitioner contends for: and there it will not be denied, that the instance of his Majesty's Advocate is exceedingly proper, and generally deemed to be an essential requisite; at least the petitioner has the utmost reason to think

so, after the doctrines he heard pleaded when the suppletory action was in dependence before the court of session.

The respondent asserts, "That there is nothing more fixed in the law of this country, than that the prosecution of all crimes *ad vindiictam publicam* belongs to the King, and to his Advocate, acting by his authority, and for his interest. Hence it is, that all such actions are under his power and controul, to be insisted or deserted as he sees cause. No lawyer of this country has ever suggested the least doubt of the Advocate's power of deserting the diets of all actions brought for his Majesty's interest; and no instance appears, or can be suggested, of your Lordships interposing your authority to stop this part of the execution of his office." And he subjoins this query: "If then he is master of every such action brought at his instance, and may desert it when he sees cause, how can it be maintained, that any private party can, by your Lordships authority, compel him to take up and prosecute such action?"

The very principles on which the respondent here argues, are those which give occasion to the demand made by the petitioner: it is because the *vindicta publica* belongs to the King's Advocate, that the petitioner craves he may be ordained to give his instance in the criminal action pointed out. But the consequences drawn from those principles, or even the more remote principles on which the respondent seems inclinable to found these, the petitioner can by no means agree to. The respondent seems inclinable, in the matter of criminal actions, to view the Sovereign of Britain in the light of an arbitrary despot *quoad* Scotland, and to consider the King's Advocate as the sole minister of his despotism. But it is apprehended your Lordships will view him in another light. The Sovereign is the first magistrate, the *pater patrie*; whose duty it is to watch over the lives and properties of the subjects, and to render them secure, by executing, with vigour, the public laws of the country. Hence he is indeed intrusted with the power of naming all proper executive officers of the law: but that power is circumscribed by the law, and must

be exercised in a legal mode, and under legal limitations. Thus, it is the Sovereign who commissions all the judges in our courts of judicature; but he must grant them such commissions as the law directs, and he must leave the judges to execute the law after he has named them. He can neither erect new courts of judicature, nor prescribe new rules for those courts already erected, to walk by: and by no means can he dispense with the laws already made. In like manner, it is his duty to appoint proper officers to raise and insist in those actions that concern the public, and to bring them before the courts of justice for discussion; but these officers, as well as the judges, must be named according to the direction of the law, and they must execute the law when once they are named.

And though later practice seems to have invested this *vindicta publica* in the King and his officers, yet from the beginning that does not seem to have been the case, nor to have obtained in the earlier periods of our law. Thus, before the year 1587, the instance of the King's Advocate seems to have been a thing unknown in criminal prosecutions; for by act 1587, ch. 77. which is intitled, *The King may persequ all crimes without the party*, it is enacted, "That the thesaurer and advocate persequ slaughteris and utheris crimes, al-
"thought the parties be silent, or wald utherways privily agree." The King's Advocate, therefore, though an officer named by the King, derives his power of prosecuting crimes, not from any emanation of the prerogative, but from the public law; his office is the legal medium through which the executive power of the crown is exercised: and the same law which hath invested him with the power of prosecuting, hath also, in the petitioner's apprehension, laid him under a legal necessity of exercising that power for the behoof of the public: it is not left to him to make an option, whether he shall exercise the power or not; but it is enacted, that *he persequ*, although the parties be silent. Where the expression hath been much weaker than this, and where it has only been declared *lawful* for the King, or his officers, to do a thing, it hath been adjudged, that these words imported a legal necessity; for that every thing that was de-
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clared lawful, was obligatory on those invested with a public office. This was in particular decided in the case, the Earl of Hopeton contra the Officers of State, 4th January 1739, in a question about the interpretation of an unprinted act of parliament 1592, relative to mines; *multo magis*, therefore, will a statute be understood to be absolutely obligatory, where the words in their natural sense import an obligation. And, indeed, unless the statute is interpreted in this sense, it must be a very imperfect and ineffectual law. The obvious meaning and purpose of it was, to prevent the escape of criminals, from the collusion of private prosecutors: it was therefore thought necessary to impose a necessity on some person or other to prosecute, in a public capacity, *ne crimina maneat impunita*; and the persons thought proper for this purpose, were the Treasurer and Advocate, on whom it was certainly meant to impose a legal necessity of prosecuting.

As therefore there is a legal duty to be exercised by all the executive officers of the law, though named by the King; so there must somewhere or other, be lodged a power of enforcing the exercise of that duty; and where can such a power be supposed to be lodged but in the ordinary courts of law, whose office it is to enforce every legal obligation? Judges, we know, may be tried for malversation in office, and punished for the denial as well as the perversion of justice: and shall his Majesty's Advocate, who, in the quality of public prosecutor, is no more than the procurator-fiscal of this court, set up a plea of immunity, and deny that he can be controuled, for no other reason, but because he holds his commission from the King? Does not every judge do the same? And is not every judge, though vested with a superior character, amenable for his conduct in the exercise of his office?

The respondent tells your Lordships, That no lawyer has ever suggested the least doubt of his Majesty's Advocate's power of deserting the diets of all actions brought for his Majesty's interest. In this, however, there is a clear abuse of words. It is not the King's Advocate who deserts diets; it is your Lordships; who, as you only can

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continue diets, so you only can desert them. And accordingly, in every case where a diet has been deserted, it will be found, that the record bears, The court deserted the diet, and not the King's Advocate. And accordingly, your Lordships will desert a diet, whether the King's Advocate agrees to it or no, where ever an informality in the libel is found, where the executions are improper, or where any other legal bar occurs to prevent a trial from proceeding. The same thing you will do, where no prosecutor appears to insist, or where, when he does appear, he declines insisting. In short, deserting the diet is the technical term of this court for dismissing an action before the verdict of a jury is returned; and the part that the King's Advocate acts in it, is no more than this, that when he is sensible, either that he has been misinformed in the merits of the cause, and that therefore there is no prospect of convicting the pannel, or that the pannel would have a legal plea, in consequence of which the trial must come to nothing, he sometimes consents that the diet shall be deserted: in other words, he declares, that he is not to insist in the libel; whereupon your Lordships desert the diet, because no person appears to prosecute. But after the King's Advocate has once given his instance, even though he should incline to desist from the prosecution, yet your Lordships will not desert the diet if another prosecutor appears, and offers to insist, *usque ad sententiam*, even although the crime should be such as in its own nature not to admit of a private prosecutor. A strong instance of this kind occurred in the case of his Majesty's Advocate and Carruthers *contra* Col. Charteris, [N^o 36.], who was tried before your Lordships for a rape; which crime being one of the four pleas of the crown, the prosecution of it belongs more properly to the office of the King's Advocate, than that of almost any other crime whatever: yet there the crown-lawyers declared, they would not concur in the prosecution; and though the Advocate's instance had been given, they disclaimed the action. The husband of the woman who was ravished, however, appearing, and insisting, your Lordships would not desert the diet: on the contrary, you proceeded, and the trial went on; the verdict of a jury was returned;

returned; and a sentence was pronounced on that verdict. The power of the King's Advocate, therefore, in commanding the diets of this court, will, upon examination, turn out to be much more inconsiderable than he seems to imagine it is. In fact, it is plain, he has no power of this kind, but what is under controul of the court.

The respondent next enters into a detail of the manner of bringing offenders to trial before the circuit-courts, of the presentments that are necessary to be made; and then he tells your Lordships, that he may or may not bring criminals thus presented to trial as he pleases; and he contends, That as there is no instance of a complaint brought against the King's Advocate, on account of not bringing such criminals to trial, so there is no room for such a complaint, nor is it competent by the law.

This is the very plea that he uses against the petitioner: but if such a complaint should be brought, it is humbly apprehended, that if sufficient evidence appeared to have been laid before the King's Advocate, to create a probability of establishing the guilt of the criminal presented, you would not consider it as incompetent. That no such complaint has been brought since the act 8^{vo} Anne, affords no argument that such a complaint would not be well founded. Every case must once have been without a precedent; and from new cases, precedents for after cases must arise. Before that act, the King's Advocate had no concern in presentments from counties, till they came to be insisted in by his deputies at the circuits. By the old law, the dittay was taken up in the counties; it was transmitted to the clerk of justiciary; who from that made up the porteous-roll for the district of each circuit-town, containing the charge against every criminal, in the form of an indictment, in which the instance of his Majesty's Advocate was seldom or never mentioned: so that, in those days, till such time as the crime was brought to actual trial, the office of the King's Advocate was not concerned. The time, therefore, has not been very long, during which it was possible for the counties to complain of the King's Advocate for refusing to give his instance;

stance; and within that time, it is believed, hardly any instances have occurred, where a prosecution was insisted on, and instance refused. If improper presentments have been sent up, and those who sent them have been satisfied of their impropriety, so as not to insist for their being brought to trial, after the King's Advocate had declined to try them, that is nothing to the present question. But both before the act 8^{vo} Anne, in case the Advocate refused to insist on a well-founded indictment, contained in the porteous-roll, and since that statute, in case he had refused his instance, when urged to give it, on a well-founded prosecution, it can hardly be doubted, but that, on a proper representation to this court, the case would have been remedied, in case it had admitted of a remedy; and in case it had not admitted of a remedy, there is as little doubt, but that the King's Advocate was punishable for his breach or neglect of duty.

For there is no question, that, both by the Civil law and by ours, the *crimen pravaricationis*, or collusion of the prosecutor of a public crime with a criminal, is highly censurable; and there is as little doubt, but that either the refusal of official instance for the prosecution of a crime, when attended with the effect of making the criminal escape, or desisting from the prosecution under such circumstances as to give the criminal an opportunity of procuring an improper sentence absolvitory, would be considered in no other light than as the crime of collusion, and must be punishable as such: but where the criminal hath not escaped by means of such official collusion, there being still room for a remedy by a proper exertion of the official powers of the public prosecutor, there a court of justice will interpose, and oblige him to exert those powers.

The respondent argues, That a court of justice intermeddling in such a matter would tend to renew the method of trial by precognition, which was formerly exercised by the privy council of Scotland, to the great nuisance of the country, but which are expressly prohibited by the commission erecting the court of justiciary into its present form.

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What commission the respondent here points at, the petitioner is at a loss to guess. The act 1672, which is the only legal commission constituting the court of judicary, has not one word in it about a precognition, or any thing relative to a precognition; and it is well known, that your Lordships have taken precognitions, for the purpose of informing his Majesty's Advocate, at no very distant period of time; and there seems to be no objection against your judging what is the duty of his Majesty's Advocate in consequence of such a precognition when taken, that does not lie against taking the precognition itself. The taking such precognitions, or the judging of the duty of the King's Advocate in consequence of them when taken, do not, in the most distant degree, resemble those trials by precognition which were in use to be carried on formerly in the privy council, and were justly complained of by the whole nation; for these were intended, not for the furtherance, but for the destruction of public justice: and though, at first mention of them, one would be led to think, that they were engines of cruelty intended to oppress the innocent; yet, in fact, they were quite otherwise, they were engines of ministerial partiality, calculated to screen and favour the escape of the guilty: for a trial by precognition generally proceeded at the instance of a pannel; it was held *intra privatos parietes*; and the person at whose instance it proceeded, was at liberty to bring what evidence he pleased at whatever time he thought proper. Hence he generally chose a time for adducing his witnesses when the prosecutor was necessarily absent; so that, by their not being properly cross-questioned, and by no contradictory evidence being adduced, one half of the truth, at least, if not the whole, was concealed: and often, without the prosecutor being heard at all in the matter, the pannel was dismissed by the privy council; and this was pleaded as a *res judicata* in every criminal court. But the precognitions that are in use now-a-days are no more than preparatory steps to a trial: and when a legal trial is brought on, they are no longer of any force or effect; they pass not to the knowledge of an assize; nor can they serve any other purpose, than that of directing

recting his Majesty's Advocate how to lay his libel, and adduce his evidence.

Hence, though even your Lordships were to pass a judgement on the import of what is contained in a precognition, for the purpose of determining whether his Majesty's Advocate should be obliged to give his official instance in a particular case, still that judgement could have no effect whatever on the merits of the trial, nor in the least prejudge the pannel in his defences: for that judgement would make no part of the record of the trial; it would not, any more than the precognition itself, pass to the knowledge of an assize. The pannel would be judged, on the evidence of the part of the prosecutor, and on that brought by himself in exculpation, in presence of the jury; and the verdict of the jury, founding on that evidence, would be the only rule for the sentence of your Lordships.

Neither would the pannel be any more prejudged in point of law, than in point of fact, by an order of your Lordships upon the King's Advocate to give his official instance for bringing a crime to trial. By such an order you do not determine the relevancy of the facts charged previous to it; you do not call on the person accused to plead his defences in law: all these are entire to him after the prosecution is once brought; and there is nothing at all incompatible, in a person being properly called into court at the instance of his Majesty's Advocate upon a criminal indictment, even by order of the court itself, and that person being afterwards dismissed on account of the irrelevancy of the libel.

The court of king's-bench in England go daily much farther. An information may there be exhibited, and leave craved of the court to file it; and the court will make a rule for the person against whom such information is exhibited, to show cause, against a day certain, why it should not be filed; and if the party does not appear to show cause against that day, the information is filed. But even though he should appear, and show cause, and though that cause should be found insufficient in consequence whereof the information is filed, still every defence in law and in fact is competent to him,

and he is at liberty to urge them all in the course of a legal trial, and to avail himself of them.

In determining, therefore, in any particular case, whether the King's Advocate ought to give his official instance to the prosecution of a crime, your Lordships give no judgement on the merits of the criminal prosecution itself, nor do you do any thing that can tend to prejudice the interest of the pannel; nothing is determined with respect to him; it is the duty of the King's Advocate only that is under your eye, and the sole thing that you inquire after is, whether that Advocate has done his duty, or not? With equal propriety that it is alledged, your Lordships, by examining whether the King's Advocate ought to give his instance in a criminal trial, or not, prejudge the merits of that trial, it might be said, that the court of session, when, on the 31st January 1633, they ordained the Advocate to give his concurrence to two bills of improbation, at the instance of the Earl of Abercorn and James Inglis, against their vassals, that that court prejudged the merits of those improbations. In fact, however, they did no such thing; they saved all defences even to the Advocate himself against the improbations. And there is no more reason for supposing, that an inquiry, whether the King's Advocate has done his duty, in refusing his instance in a particular case, would prove a prejudicial action to the merits of the case itself, than for saying, that the act of sederunt above mentioned was a prejudicial judgement on the merits of the improbations.

In fact, your Lordships do, in every criminal case, before it comes to trial, pronounce a judgement which might more justly be termed prejudicial than the one which is now demanded. For no criminal summons can pass the signet of justiciary, unless upon a bill, containing the whole substance of the libel, which is presented to you, and on which a warrant is obtained for issuing criminal letters; and there can be little doubt, that if a bill should be presented, which, *ex facie*, contained in it nothing of a criminal nature, your Lordships would refuse your *flat* to the desire of the bill, and no criminal letters could be issued. By your signature on the bill, therefore, you,

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in some sort, judge of the relevancy of the accusation: yet such judgement was never yet deemed to be prejudicial to the merits of the cause: and the pannel, when called to the bar, in consequence of a citation given him on the criminal letters, hath never been held to be precluded from pleading every defence in law against the relevancy of the libel; nay, in former times, there are numberless instances of such libels being dismissed as altogether irrelevant.

The respondent, towards the end of his answers, pleads the powers of his office in very high terms; he denies that he is under the direction of any court whatever: he tells your Lordships, that there have been instances of recommendations from this court, from the court of session, and from the court of exchequer, to prosecute particular offences, occasionally falling under the observation of the judges; but that no instance occurs on record, of such prosecutions being ordered. From which he concludes, that he is not bound to obey the directions given him by any court whatever.

The petitioner, however, differs from his Majesty's Advocate, both as to the facts themselves, and as to the conclusions he draws from these facts. In whatever terms courts have been in use to address the Advocate, when they directed him to exert his official powers, that cannot afford an argument, that he lay under no obligation to obey those directions: they might use the word *recommend*; but where the terms of that recommendation were explicit, it is much the same thing as if they had commanded. Thus, when the court of session appoint counsel to appear for any person in a particular emergency, the expression they generally use is, That they recommend it to such counsel; but it cannot be doubted, that such recommendation has the force of a command; and that if those to whom it is directed should contemptuously neglect it, they would be censured by the court for such neglect. In like manner, though both this court, and the courts of session and exchequer, may have been in use to give directions proceeding from themselves *ex officio* to the King's Advocate, in the way of recommendation; yet still

such recommendation imported an obligation on him to do what was recommended to him.

But a little attention will show, that these courts have not always been so delicate towards his Majesty's Advocate, as to use this expression of recommending. In the case mentioned in the petition, of the complaint of the Earl of Abercorn and James Inglis against the Advocate, 31st January 1633, they *ordained* the Advocate to subscribe the bills, and made a general order with respect to his duty in time coming. The respondent objects to the authority of this precedent: he says, the action of improbation is of a civil nature, and therefore cannot apply to the present case. Admitting it to be so, yet still an action of improbation is a case wherein the official powers of the Advocate are concerned; and as it occurred in a civil court, it sufficiently shows, that his official powers, in so far as the jurisdiction of the court of session was concerned, were understood to be under their controul. But further, the action of improbation is in reality a criminal action, and the concurrence of the King's Advocate seems chiefly intended to aid the criminal conclusions of the action. This precedent, therefore, is a precedent in point, that the office of the King's Advocate, in so far as the punishment of crimes and the power of criminal prosecution belong to it, is under the controul and direction of the courts of justice. It cannot be expected, that the petitioner should be able to lay before your Lordships the various instances that have occurred, wherein the court of session have directed the King's Advocate in what manner his office was to be exercised; such incidents do not usually appear in our printed collections of decisions: even the case above mentioned is not to be found in any printed collection; and had it not, in consequence of the general order relative to the duty of the King's Advocate, been inserted in the books of federunt, the memory of this precedent would have been lost. The petitioner, however, will mention two other cases, where the court of session not only directed the concurrence of the King's Advocate to be given, but even his instance. One of them we find narrated in a very late collection of decisions,

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in the case of Barbara Newlands *contra* Alexander Newlands, decided June 1741, in the following words. "11th June 1577. The

"Lords of Council, *ex officio*, ordained letters to be directed at the instance of our Sovereign Lord's Advocate, to warn Malcolm Bower and Henry Anderson to compare personally before the said Lords, 21st instant, with continuation of days, to answer to such things as shall be inquired at them, under the pain of rebellion, and putting them to the horn."

The other case is to be found in Lord Fountainhall's collection of decisions, 3d November 1698; where it is reported in the following words. "William Johnston in Haddington having pursued his brother Robert, for reduction and improbation of a disposition made by their father to the said Robert, of his whole estate and moveables; and the instrumentary witnesses being examined, two of them acknowledged their subscriptions, but confessed they did not hear the defunct disponent give warrant to the notars to subscribe for him; and the third denied it was his hand-writ, or that he was at Pople-mill (where it bears to be signed) at that time. The Lords, at advising, were clear to find the writ null, and not probative; but stuck as to the falsehood, seeing two of them acknowledged they signed as witnesses in the presence of the disponent, and only the third denied his subscription; and before answer to the falsehood, or remitting them to the criminal court, *ordained all the parties on life to be cited at the King's Advocate's instance*, to be re-examined, for expiscating the falsehood, if any be; for the Lords observed, where the parties got the writs reduced, they thought themselves no farther concerned to insist any more, and declined the expense of prosecuting the criminal part."

In passing, it may be observed on this decision, that it destroys the hypothesis the respondent builds on the civil nature of the action of improbation, as if it was owing to that, that he is obliged to give his concurrence in that action; for here the civil part of the action was brought to a conclusion by a sentence, and nothing remained but to proceed to the criminal part, in which the court took the direction

rection of the instance of the King's Advocate; and that too, as appears from the narrative of the decision, with a view of founding a prosecution for forgery in this court, to which they had it in view to remit the forgers; and this, although they had a proper party in court for carrying on the action, who does not appear to have refused to insist: but the court seeing a *probability* that public justice might be frustrated, though they might have compelled the pursuer to insist *usque ad sententiam*; yet they chose to order the prosecution to go on in the name of the King's Advocate, who, as the public prosecutor, seemed more immediately bound to prosecute a question of public justice.

It is not to be doubted, that if one were to go to the records of the court of session, upon an accurate search, many other precedents of the like kind might be found. These, however, are sufficient to show, that they have made no distinction between the *instance* and the *concourse* of the King's Advocate, but have considered that both were alike under their controul.

And with respect to this court, it is humbly apprehended, that as the duty of the King's Advocate here was from the beginning no more than that of a procurator-fiscal; so he stood in the same relation to the court that procurators-fiscal do to inferior courts; and, as an officer of court, was as much under the direction of the judges, as procurators-fiscal are in the courts in which they practise. And accordingly, if the earlier practice of the court is looked into, it will be found, that that was the case. Thus, originally, it was not the King's Advocate, but the court itself, that made inquiry after malefactors; as is evident from the statute of Alexander II. ch. 2. "Staut Dominus Rex Alexander, illustris Rex Scotiæ, de concilio et
" assensu venerabilium patrum, episcoporum, abbatum, comitum,
" baronum, ac proborum hominum suorum Scotiæ, ut *justiciarius*
" *suus Laudoniæ diligentem et privatam inquisitionem faciat de malefac-*
" *toribus terræ, et eorum receptatoribus, per sacramenta trium homi-*
" *num bonorum et fidelium, una cum sacramento senescalli, de singulis*
" *villis singulorum vicecomitatum infra balliam suam, præterquam*
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“in Galluidia, qui leges suas habent speciales. Et si quos, per dic-
 “tam inquisitionem legaliter factam, invenerit, eos festinanter, per
 “servientes Domini Regis, cum auxilio hominum domini villæ,
 “salvo faciat attachiari, et ad certum diem et locum coram justiciario
 “per fidele vicinetam transeant.” Afterwards, either by some law
 which is now lost, or by practice, it obtained, that the Justice-Clerk
 became the proper officer for taking up dittay; and accordingly he
 is mentioned as such in all our statutes, from the beginning of the
 reign of James I. downwards to that of James VI. and it was only
 that officer who made out indictments, or had the power of bringing
 criminals to trial. But in the year 1587, commissioners of dittay
 were appointed for the several counties, who seem to have been vest-
 ed with the sole power of indictment, and making up the porteous-
 roll for the circuits, and even for the counties of Edinburgh, Had-
 dington, and Linlithgow. And on this footing matters seem to have
 continued down to the 8^o Anne. In all these cases, therefore, the
 duty of the King's Advocate was no more than that of a procurator-
 fiscal, to follow out the indictments that had been made up by the
 proper officer. His instance was not regarded in the beginning of a
 prosecution; for the indictment was made up without his knowledge
 or consent, and was presented to the justice-ayre, where he prosecuted
 it officially. It is true, that after the act 1587, ch. 83. he might
 pursue by way of criminal letters at his own instance: but in those
 days there was no necessity for compelling him in any case to give
 his instance, because the proper remedy was, to lodge an information
 with the commissioners of dittay, on which the person informed a-
 gainst, might be indicted, and put into the porteous-roll. There is
 no question, however, but that if the Advocate had refused to pro-
 secute an indictment regularly served on a pannel, your Lordships
 would have interposed to compel him to do his duty as an officer of
 court; and there can be as little question, that now when his in-
 stance seems to have become an essential requisite in the prosecution
 of a public crime, that your Lordships, upon an improper refusal of
 that instance, will compel him to give it, *ne crimina mancant impunita.*

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And as to the court of exchequer, as that court is altogether an English court, and proceeds upon the principles of English law, and by English forms, it is humbly apprehended, that whatever the privileges of the King's Advocate may be understood to be there, that can have no effect on the nature of the office in your Lordships court. It is believed, however, that in the court of exchequer, the King's Advocate is no less under the direction of the court, than he is in the courts of session and justiciary. The petitioner, however, will not enter into an accurate discussion of this matter. The court of exchequer is of no long standing in this country; and it is believed, it seldom, if ever, happens, that the King's Advocate insists in his own name in that court, most prosecutions being carried on by informations in the name of the officers of the revenue. In disputing upon this point, therefore, the petitioner would be obliged to quote the laws and recur to the precedents of another country, in which his counsel are not sufficiently versant; though it is believed, upon inquiry, it will be found, that the courts in England not only recommend to, but even direct the attorney-general, in points relative to the duty of his office: and the office of his Majesty's Advocate, in the court of exchequer, it is apprehended, is precisely of the same nature with that of the attorney-general in England. These matters, however, are not *hujus loci*; the petitioner is here considering what is the nature of the office of King's Advocate by the law of Scotland; and whatever may be the case of the exchequer, which is a court that proceeds by a foreign law, and by foreign forms, that has no connection with the nature of the office in this court.

The petitioner, therefore, apprehends, that in all the King's courts, the King's Advocate is not only judicially amenable to each for his conduct in the exercise of his office in that particular court, but is also under their direction, and bound to obey their orders: they are the King's judges, and he, as the King's servant, must receive directions from them.

The King's Advocate, in the character of public prosecutor at his own instance, is not an officer of the common law, the institution of
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of whose office lies beyond the memory of record. Were that the case, there would be more field for his arrogating to himself extraordinary powers and extraordinary privileges: but it is clear, that in that capacity, he is a creature of special statute, having this power given him by the act 1597 above quoted. As therefore his powers are given him by statute, so, it is apprehended, by statute only they ought to be explained: they cannot be extended wider than the statute authorises them to be; and it will not be supposed, that unusual privileges are implied in the words of the statutes that gave him his powers. There is no foundation in them for that very extraordinary privilege which he claims, of not being amenable in the ordinary courts of justice, and being accountable only to the sovereign for the execution of his office. As therefore the statutes themselves give no warrant for supposing him vested with such a privilege, so there is no precedent in any court tending to this purpose; on the contrary, many precedents have been quoted that have an opposite tendency. The respondent, therefore, cannot be allowed to argue at large concerning the powers of his office from hypotheses and supposals. The laws that made him are still in existence; and from these laws only can it be judged what powers and privileges were meant to be bestowed on him. Besides that there is not the most remote foundation in those laws for the privileges which he now claims, they seem adverse to the principles of the British constitution; and therefore would not readily be received upon implications and constructions drawn from a statute, unless they were very plainly set forth in the words of it.

Upon the whole, therefore, the petitioner humbly apprehends, that the plea which is set up by the respondent in behalf of his office, That he is not judicially amenable to the courts of justice, is altogether unconstitutional, and consequently illegal. If he, an officer appointed at the pleasure of the crown, is accountable only to the sovereign for his conduct in his office, and may at the same time refuse to bring to trial crimes which cannot be tried without his instance, there is certainly, indirectly, lodged in the crown, a power of

disabling the penal laws of Scotland, contrary to the claim of right, whatever the respondent may pretend: and though his conduct in this case must be judged of from the circumstances of the case itself, yet as the general point is of the utmost public importance, it is humbly apprehended your Lordships will think proper to give a general judgement, concerning the powers of an office which the respondent has pleaded for to such an extraordinary height."

NOTE of OPINIONS.

AUCHINLECK. Inconveniencies would arise from obliging the Advocate to bring prosecutions on the opinion of others.—Indemnification as to expence not enough:—but as here an atrocious crime, the court may recommend to him to take notice of it.

ALEMOOR. Court cannot interpose.—Sufficient precautions taken for the punishment of crimes.—Improper for judges to direct prosecutions.—Judges in England cannot compel a grand jury to find a bill.—Had the Advocate refused his concurrence, he might have been compelled to give it; for every one intitled to justice: but he cannot be forced to prosecute.—In this the petitioner desires the court to become the prosecutors, and they know nothing of the proof.—If the Advocate was to be forced to prosecute, the defender, if acquitted, would be deprived of costs and damages.

COALSTON. Crimes affect either the public or private parties.—Power of prosecuting the first lodged with the Advocate, who is in place of the grand jury.—His duty in most cases to prosecute, when the precognition strong; but the court cannot direct him—Ecclesiastical courts*.—But it is the duty of the court to recommend to him.

PITFOUR. A recommendation proper, when a crime comes incidentally before the court; but that not the case here.

* There is no public prosecutor before them.—The note is very imperfect.

KAMES.

Feb. 1767.

2 ROBB &c. against HALLADAY.

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KAMES. King's Advocate answerable to the King. — Romans forced to make a law, obliging those who accused *inscribere in crimen*.

June 21. 1766. Court refused the desire of the petition.

For the petitioner, Ilay Campbell, Crobie, Blair. Alt. Montgomery, Sir D. Dalrymple.

N^o 75.

Feb. 1767.

ROBERT ROBB, first magistrate of the borough of Wester Anstruther, with concurrence of his Majesty's Advocate,

GABRIEL HALLADAY, Schoolmaster there.

Perjury.

THE criminal letters in this case set forth, "That where, by the law of God, of this and all other well-governed realms, the crime of perjury, or affirming lies or falsehoods judicially upon oath, is a crime of a heinous nature, and severely punishable; and more particularly, by the 19th act of the 5th parliament of Queen Mary, intituled, *Anent them that marries twa wives or husbandes*, the pains to be inflicted on those who commit perjury are declared to be, "Confiscation of all their gudes moveable, warding of their persones "for zeir and day, and langer induring the Queenis will, and as "infamous persons, never able to bruik office, honour, dignitie, "nor benefice, in time to cum:" Yet true it is, and of verity, that the said Gabriel Halladay is guilty, actor, art and part, of the crime of perjury aforesaid; in so far as, a complaint having been presented to the court of session, at the instance of Robert Hunter land-surveyor of the customs at Anstruther, and others, founded upon the statute of the 16th year of his late Majesty, intituled, "An act "to explain and amend the laws touching the elections of members "to serve for the commons in parliament, for that part of Great "Britain called Scotland, and to restrain the partiality, and regulate

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“the conduct of returning officers at such elections,” and praying the court to reduce, and make void, the election of magistrates and counsellors of the borough of Wester Anstruther made on the 18th day of September 1765; to which complaint answers were made on the part of the present complainer and others: and a proof being allowed, and Alexander Tait and David Ross, principal clerks of session, Alexander Gray, Robert Leith, and Alexander Ross, deputy-clerks of session, and Mr James Balfour Advocate, or any one of them; and, failing all of their attendance and acceptance, the sheriff-depute of the county of Edinburgh, or his substitute, being named commissioners for taking the said proof, the said Gabriel Halladay was cited as a witness on the part of the complainers; and having appeared in the presence of Mr James Dundas Advocate, sheriff-substitute of the said county of Edinburgh, one of the commissioners, he the said Gabriel Halladay, having shaken off all fear of God, and regard to the laws, did, on the 20th day of February 1766, or on one or other of the days of that month, or of the month of January immediately preceding, or of the month of March immediately following, in presence of the said commissioner, within the Exchange coffee-house in the city of Edinburgh, emit a deposition, affirming falsehoods judicially on oath, in sundry particulars; and more particularly, the said Gabriel Halladay, time and place aforesaid, did depone, “That upon the Monday or the Tuesday of the week in which Sir John Anstruther came to town, Robert Peattie came into his house about eleven o’clock at night, from a meeting of the council in Robert Lyall’s house, and was informing his wife how the council was to be modelled; upon which she said to her husband, I wish we may make an ox of it: That Peattie answered, I expect six oxen of it; for I expect L. 50 to the chest-nut, and a post to Tam;” although no such conversation ever passed between Robert Peattie and his wife. And the said Gabriel Halladay did further depone, “That the night following, the deponent heard Robert Peattie say to his wife, Now we are all Mr Alexander’s friends, and have shook hands with him, except Bai-

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"lie Brown, who had shown some reluctance, for fear of losing his
"post; and that Mr Alexander had said to him, he needed not be
"afraid of his petty post, for he should take care that he should be
"no loser by joining his interest. Depones, That Peattie at this
"time told his wife, That Mr Alexander had called them all one by
"one into a separate room, beginning with Bailie Brown; but the
"deponent did not hear any mention made of what had passed in
"that separate room; and that, as soon as they had all returned
"from this separate room, and taken their former seats, Mr Alex-
"ander drank to them all as his good friends: That the same night
"Peattie said to his wife, You see the fruits of it now, *holding out his*
"*hand to her*; and that she said, I'll warrant there is forty there.
"To which Peattie said, there is double the sum. And being inter-
"rogate, How he came to know, that Robert Peattie was holding
"out his hand to his wife at the time he used the above expression?
"depones, He presumed so from the conversation. Depones, That
"there was some altercation betwixt them that night about the dis-
"posal of the money, the husband being for putting it into some
"secure hand, and the wife for keeping it among themselves, that
"no body might know any thing about it; and said, she would not
"lay it out upon brawls, as some others had done, but would use it
"to buy a piece of meat to themselves through the winter; and they
"concluded to lay it by in the folds of a board-cloth;" although no
"such facts or conversations as those deposed to ever were held, or
"did happen. And further, the said Gabriel Halladay, time and
"place aforesaid, did depone, "That some time after, one Mr Stewart,
"a halfpay-lieutenant in the navy, came into the house; and the
"deponent heard him desire Mrs Peattie not to change any of the
"notes while they were in the place, in case they should be disco-
"vered; but desired her, when they wanted money, to let him
"know, and she should be supplied: That Mrs Peattie answered,
"She would keep none of them; for the first time she saw Mr A-
"lexander, she would have gold for them." And in another part of
"his deposition, he depones, "That the conversation with Mrs Peat-
"tie

"He and Lieutenant Stewart happened the day before, on the day
 "of the second election, upon the 25th of September last. Depones,
 "That he did not know Lieutenant Stewart by his voice, but went
 "and stood in Katharine King's door, and saw him come out of
 "Robert Peattie's house;" although no such conversation ever hap-
 pened between Lieutenant Stewart and Mrs. Peattie; and although,
 at the time deposed to, the said Lieutenant Stewart was not in the
 borough of Wester Anstruther, but was at a considerable distance
 therefrom, and did only arrive in the town of Anstruther-Wester up-
 on the 18th day of October 1765. And further, the said Gabriel
 Halladay, time and place above mentioned, has deposed, "That
 "soon after Sir Harry Erskine's death, and before Mr Wedderburn
 "came to town, the deponent heard Bailie Brown say, he would de-
 "fire no more than a new town-house, and two acres of land added
 "to the town's revenue; and that if the council would stand by
 "him he would get this: That Robert Peattie, when Bailie Brown
 "turned his back and went off, gave a hitch with his shoulder, and
 "said, We must first have something to our own pockets;" altho'
 no such conversation as that here deposed to ever happened. And
 the said Gabriel Halladay hath further deposed, "That Walter
 "Thomson never made any objection to the deponent against Mr.
 "Alexander's paying the expence of his son's learning architecture
 "at his school;" although it is true, that the said Walter Thomson,
 in a conversation with the said Gabriel Halladay, did object to Mr.
 Alexander's paying the expence of his son's learning architecture at
 the said Gabriel Halladay's school; and particularly, he did declare,
 that he would not allow his son to attend his school on these terms;
 and accordingly his son did not go to the school of the said Gabriel
 Halladay to learn architecture. And which foresaid deposition, bear-
 ing date the said 20th day of February 1766 years, duly signed by
 the said Gabriel Halladay, the said Mr James Dundas as commis-
 sioner, and George Falconar writer in Edinburgh as clerk, is to be
 used as evidence against the said Gabriel Halladay in his trial, and
 is lodged in the hands of the clerk of the court of justiciary, before
 which

which the said Gabriel Halladay is to be tried, that he may see the same. At least, time and place fore said, the said Gabriel Halladay, being duly sworn, did depose falsely, by swearing all, or one or other of the particulars fore said, in the words and expressions above libelled, or in other words and expressions of the same meaning, purpose, and effect; whereby he was guilty, or art and part, of the horrid crime of perjury, or false swearing, above charged. All which, or part thereof, &c.

The defender's deposition in the civil cause was, upon an application to the court of session, transmitted to this process.

The defender pleaded, Not guilty, and referred his further defence to his counsel. They set forth, That this trial takes its rise from a political source; for he having exerted himself on one side, in the late contest for the district of boroughs, of which Wester Anstruther is one, the gentleman he opposed had conceived much resentment against him; and, among other troubles, had brought this trial upon him; in which that gentleman was the real, though Robb the nominal prosecutor: And then they took several exceptions to the charge. Answers were made for the prosecutor; and the court ordered informations.

Objection 1. His Majesty's Advocate having only given an official concurrence, Robb has no title to prosecute, because he has no interest; for it is not alledged in the charge, that he has suffered any loss in his person, character, or goods, by the oath in question. Had the action been at the instance of Peattie, against whom it tends to fix bribery, the title perhaps might have been sufficient; but Robb has no concern: He prosecutes therefore as *quilibet e populo*; but our law does not admit of popular actions.

Answer. Perjury is a public crime. And were it necessary to argue the general point, it might be shown, notwithstanding commonly received prejudices to the contrary, that every public crime may be prosecuted by individuals, not only without the instance, but without the concurrence, of the King's Advocate. And this doctrine could

could be supported, not only by principles, but by decisions of this court. It is, however, needless to enter upon that at present, as the tendency and effect of the defender's oath, if believed, would be, to turn the prosecutor out of his office as magistrate, and annihilate the corporation of which he is the head, which gives him an interest and a title.

Replied for the defender, in the *first* place, Such interest has not been libelled upon; and, *2dly*, Though it had, it would not be sufficient; for it is a remote and indirect interest. Besides, how is it possible to show, that this oath will have any effect on the decision of the civil cause? It may perhaps be of use to Robb and his adherents in that cause. The defender's oath is *sub judice* in another court; and the prosecutor, against whom there is not a syllable in the oath, has no title to complain of it as matters stand at present; because it is impossible for him to make it appear, that he has suffered any damage or disadvantage by it; *Hawkins*, 1. 81. None of the proceedings before the court of session are produced: so that there is not so much as evidence in this court that Robb is a party in the other.

Obj. 2. The libel is laid on a wrong statute. The act on which it is founded contains no more than a declaration as to what was then understood to be the punishment of perjury; but the act 47. parl. 6. Queen Mary, makes a different enactment as to perjury committed by a witness upon oath; and declares, that its regulations shall be the rule in all time coming.

Ans. The libel is founded upon the common law, rather than upon any particular statute. That mentioned in the major proposition does not inflict any new punishment for perjury, but simply declares what the punishment of that crime, by the common law, was, and extends the same to bigamy: And as the statute libelled on does not derogate from the common law, but in fact declares the punishment which it inflicts; so neither does the act of the 6th parl. Queen Mary derogate from the other; it in reality inflicts the same punishment with some additions. Confiscation of moveables, and infamy,

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are mentioned in both as parts of the punishment. The statute of parl. 5. adds to this imprisonment for year and day, and longer at the pleasure of the Queen; which, in the language of law, means the pleasure of the courts of justice. The statute of parl. 6. permits the same thing, under the name of farther punishment to be made in their persons, at the sight and discretion of the Lords, according to the quality of their fault. The difference then between the two statutes is only this, that the act of the 6th parl. adds the punishment of piercing the tongue to that inflicted by the common law, which is not abrogated, but remains in full force, notwithstanding this last statute. So this libel, which is founded on the common law, is properly laid, and must be relevant, so far as the punishment of the common law goes; and the prosecutor never intended more.

Obj. 3. The libel does not charge the defender with emitting falsehoods upon oath wilfully, or knowing them to be such; yet the *animus* or intention is essential; Hawkins, vol. 1. p. 172. 173. 178.

Ans. The technical term of *perjury* is made use of, which includes both the *animus* and the act: and though that term had not been used, the charge, that he affirmed falsehoods judicially upon oath, would have been sufficient; for it must be presumed, that he did so intentionally, as otherwise it would be impossible to convict any person of this crime. If the defender alledges, that he was mistaken as to matter of fact, he must prove that defence, and show how he came to be mistaken.

Replied, The charge of perjury is qualified by what follows in the libel, *in so far as, &c.* A criminal purpose must be libelled; for it will not, and ought not, to be presumed. A libel for murder would not be properly laid, if it only charged the taking away the life of a man.

Obj. 4. From the manner in which the libel is laid, and the list of witnesses subjoined to it, the prosecutor evidently means to prove the crime of perjury against the defender by the deposition of witnesses. But this is not competent, the deposition of one witness being as good as that of another: and if such mean of proof were allowed, there

would be a progress *in infinitum*; for if witnesses were admitted to convict the defender of perjury, these witnesses might be convicted of the same crime by another set. That this is not competent, was decided in the case of Balcanquhal against Rigg, taken notice of by Mackenzie, tit. *Perjury*; and both Stair and Bankton hold this to be law.

Ans. Were this objection to be sustained, impunity would be bestowed on all persons guilty of this crime; for it seldom can be proved otherwise than by witnesses. That such proof is competent, is expressly laid down by Balfour, tit. *Of probation by witnesses*; and he quotes a decision, April 1565. It has been several times sustained by this court, and within these few years: the case of Mackillop, 1764, and case of Kirkpatrick at a circuit. No such case as that referred to by the defender is to be found in the records for the year 1677.

Repl. In the cases of Mackillop and Kirkpatrick, the person tried was single and unsupported in his deposition; whereas this defender's is corroborated by the concurring testimony of other witnesses, as would have appeared, had the proceedings before the court of session been produced.

Obj. 5. A variety of persons are mentioned in the libel; such as Bailie Brown, Walter Thomson, Robert Peattie, Lieutenant Stewart, &c.; but it is not said who they are, nor is any proper description given of them.

Ans. These are so described that there can be no doubt about them. The defender cannot be convicted, unless the prosecutor bring home his proof by these very persons; and the application of the proof is a matter that must be judged of by the jury: so the objection is not *hujus loci*.

Obj. 6. It is improper to bring the defender to trial before this court. The judges of the civil court, before whom his oath was emitted, might, and would have, determined, whether or not he was guilty, in an incidental manner: and from their knowledge of the whole circumstances of the case, must have been better able to judge

judge of that question, than any jury possibly can be. The plain drift of bringing the prosecution here, is to affront the defender, discredit his deposition in a civil cause, and thereby prejudice and influence the civil question.

Ans. It is competent for the court of session to inflict censures, or slighter punishments, for misdemeanors and crimes, occurring in the course of procedure before them; and should it appear to them, that this defender had sworn falsely, they no doubt would punish him: but the proper jurisdiction for the trial and punishment of crimes is in the court of justiciary: and as the defender's guilt is to be established by other evidence than that given in the course of the proof before the court of session, a separate action became necessary before this court; and a complaint to the court of session, in such case, could not have been competent. The prosecutor has no intention to prejudice the civil question; and therefore he is willing this trial shall be delayed till that is over.

The judges were all of opinion, there was nothing in the objection, That the libel was laid on a wrong statute, because perjury is a crime at common law; but as the essence of the crime was not charged, viz. That he knew what he swore was false, as the prosecutor could not qualify any proper interest, and as the proceedings before the court of session were not produced, they dismissed the libel.

Adv. Crossie, MacLaurin, *et alii*.

Adv. Lockhart, Ilay Campbell, *et alii*.

N^o 76.

March 1767.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JOSEPH TAYLOR.

An Englishman, who stole horses in England, and brought them to Scotland, may be tried in Scotland for the theft.

THE indictment charged, That he, in the months of June, July, and August 1766, had feloniously and theftuously stolen, from some grass-fields near to the city of Carlisle, in the county of Cumberland, three mares, which he had carried into Scotland; two of which belonged to Joseph Atkinson maltster in Carlisle, and the third to George Little residenter in that city: That the pannel fled with these mares into Scotland; and Atkinson having pursued, and traced him from place to place, at length came up with him at Bankhouse, near Edinburgh; where he apprehended him by a warrant from a justice of peace; and the three stolen mares were found in his possession.

When the pannel was brought to trial, counsel were assigned him; and they argued, That, as it appeared from the libel, the crime alleged against him had not been committed in Scotland, over which country alone the jurisdiction of this court extends, no trial could proceed. — The court ordered informations.

The information for the crown argued,

“ The present question is of the greatest importance, *not only* to the kingdom of Scotland, and to both the united kingdoms, but to criminal law in general. As the punishment of crimes is indispensibly necessary for the preservation of good order and the peace of society, every attempt to withdraw criminals from a fair and impartial trial, must be attended with the worst of consequences. It is a matter

matter of the greatest importance in all countries, that it should not be difficult to bring criminals to justice; and a facility of escaping the punishment their crimes deserve, must be entirely subversive of good government. Your Lordships, therefore, will consider this question with that attention which it deserves, and will not allow the pannel to escape from justice, unless it is clear, that you have no power to try the crime he has committed.

As this is a question of criminal jurisdiction in general, so it falls to be determined rather from the general principles of criminal law, than from the particular constitutions of any country. In handling this question, therefore, the prosecutor shall, in the *first* place, consider the general principles of jurisdiction; in the *second* place, he shall lay before your Lordships such authorities as he has discovered from the laws of different nations on this subject; and, *lastly*, shall return answers to the arguments that have been pleaded on the part of the pannel.

All jurisdiction, both civil and criminal, was certainly in its first idea strictly territorial. Judges were appointed in every nation to try causes and crimes which took their rise within their own jurisdiction; and at that time it would have been reckoned as much beyond the power of a civil judge to determine any question arising in a foreign country, as for a criminal court to try a crime committed *extra territorium*. This rule, however, has been long reckoned absurd in civil cases. It is certainly contrary to every principle of law and equity, that a man, after entering into the most solemn covenants and agreements, and perhaps receiving value from the other party, should, by flying into another kingdom, screen himself from performing what is incumbent on him; or that, after borrowing sums of money, he should, by carrying off his goods into another country, put it out of the power of his creditors to operate payment. For these reasons, it has long ago been introduced into the laws of all civilized nations, that action is sustained against every person, where-ever he or his goods are found, for performance of any contract or agreement he has entered into in any foreign country.

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This is particularly the case in Scotland. The court of session long ago saw the inconveniencies attending the strict idea of territorial jurisdiction; and therefore resolved to sustain action upon civil causes taking their rise in a foreign country, in all cases where the defender or his goods could be found in Scotland. In England too, where the common law is adhered to with a scrupulous exactness, the necessity of a remedy for the above evil became long ago apparent; and a curious enough method was fallen upon to reconcile it with the ideas of territorial jurisdiction. In every civil cause, the ground of action must, by the common law, be set forth to have happened in some county within the kingdom of England; and to obviate this difficulty, foreign contracts, &c. are laid in the libel to have happened, for example, at Paris in the county of Middlesex; and which alledgeance is not allowed to be traversed.

The case is precisely the same in criminal jurisdiction. Judges were at first appointed to try crimes committed within their territory; and the original idea was, that they could not judge of any thing that happened beyond the bounds of their jurisdiction. This idea, however, soon came to be changed. It was contrary to every principle of law, equity, and common sense, that one who had been guilty of the most atrocious crimes should, by flying into another country, escape the punishment he deserved, and live upon what he had acquired by such flagitious actions. This was not only unjust to the persons he had wronged, and to the nation where he had committed his crimes, but likewise the country into which he fled, had a strong interest to prevent such criminals from coming amongst them, and to bring them to justice. For, in the *first* place, There was a danger that they might repeat the same crimes they had formerly been guilty of; and, *2dly*, They might tempt other people to follow their example.

The great object of punishment is not so much to wreak revenge upon a criminal, as to deter others from committing the like crimes in time to come. The taking vengeance for the crime committed, no doubt, principally belonged to the country where it was perpetrated; but the other great end of punishment principally affected the

the country into which the criminal had fled, as it might tempt other people to follow his example, if they should see a criminal living free and undisturbed, enjoying the fruits of his villany. For these reasons, it was early introduced into the laws of all civilized nations, that judges might try crimes committed in foreign countries, when the criminals fled into, or were caught within, the bounds of their jurisdiction. The memorialist shall point out to your Lordships some authorities in support of this doctrine.

“ Quæstiones eorum criminum, quæ legibus, aut extra ordinem
 “ coercentur, ubi commissa vel inchoata sunt, vel ubi reperiuntur,
 “ qui rei esse perhibentur criminis, perfici debere, satis notum
 “ est;” *l. 1. Cod. Ubi de criminibus agi oporteat.*——“ Non est du-
 “ bium, quin cujuscunque est provinciæ homo qui ex custodia
 “ producitur, cognoscere debeat is qui ei provinciæ præest, in qua
 “ provincia agitur;” *l. 11. Dig. De custodia et exhibitione reorum.*——
 “ Congruit bono et gravi præfidi curare, ut pacata atque quieta
 “ provincia sit quam regit: quod non difficile obtinebit, si sollicite
 “ agat, ut malis hominibus provincia careat, eosque conquirat;”
l. 13. Dig. De officio præfidis. And the same doctrine is laid down
 in the third law of that title.

Sande, in his *Decisiones Frisicæ*, book 1. tit. 1. def. 6. *Ubi de crimine agi oporteat*, is very clear and explicit upon this point. He mentions a case of a Frizelander, who had committed a murder in Frizeland, and fled to Dunkirk, where he was guilty of other crimes; and having been at length apprehended, was sent back to Frizeland by the magistrates of Amsterdam, who had taken him. This criminal was indicted at the instance of the public prosecutor for different crimes, some committed in Frizeland, and others in Ameland; as to the last of which, he declined the jurisdiction of the court, as these crimes were not committed within their jurisdiction. Sande gives his own opinion in the following words. “ In criminalibus enim forum
 “ competens est, non tantum ubi reus crimen admisit, vel ubi lis
 “ inchoata aut contestata est, sed etiam ubi reus domicilium habet,
 “ vel ratione habitationis vel originis; quin et ibi ubi deprehenditur,
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“ *etiamsi ibi domicilium non habeat* ; unde vulgare dictum, *Ubi te inveniero, ibi te judico*. Vigor enim disciplinæ publicæ exigit, ne maleficia maneant impunita, utque tranquillæ et pacatæ sint provinciae, ac improbis et malis hominibus purgentur.”

He then goes on to mention the opinion of some people who thought that the delinquent ought to be sent to the place where he committed the crime; and adds, “ *Quæ opinio admitti potest, quando uterque judex est sub uno eodemque principe vel republica*; at, inter duos principes, vel liberas respublicas, par in partem, non habet ejusmodi remissionis imperium; et ideo fontes eo loci puniuntur ubi inveniuntur.” For these reasons, he adds, that the declinature was repelled, and the pannel was convicted, and executed. In the same place he mentions another case, of a man who had committed two murders in Ameland, for which he was tried and beheaded in Frizeland.

To the same purpose Huber gives his opinion, in his treatise *De jure civitatis, lib. 3. cap. 3. par. 13.* He says, “ *Denique ad hunc locum cum delicta referuntur, quæ tam ratione loci quo crimen admisum, quam personarum judicantur, scilicet, ubicunque deprehensi sunt, maxime tamen ubi deliquere puniendi facinorosi.*”

Carpzovius, in his *Practica nova rerum criminalium, pars tertia, quest. 110. par. 8.* says, “ *Triples, meo judicio, constitui potest forum in causis criminalibus; nempe, domicilii, delicti commissi, et deprehensionis rei: solet enim delinquens hodiernis moribus convenire, et contra eum inquisitorie, aut per viam accusationis procedi, ubi domicilium habet, vel ubi delictum fuit perpetratum, vel in loco ubi deprehensus est.*” And in the 69th, 70th, and 71st paragraphs of the same *quest.* he repeats the same opinion, and declares, that it is agreeable to modern practice.

Mattheus, in his Commentary upon the 48th book of the Pandects, *tit. 13. cap. 5. § 4.* says, “ *Sortitur autem forum reus, non solum ubi deliquit, sed et ubi domicilium habet, et ubicunque reperitur.*” He then goes on to refute the opinion of Accursius, who thought that criminals could only be punished where they were apprehended,

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prehended, in cases where they were vagabonds, and had no certain habitation; and then he adds: "Nos affirmamus, ex l. 1. *Cod. Ubi de crimine*, quæ simpliciter et sine distinctione docet, reos ubi reperiuntur accusari posse;" and in the same place he insists upon this doctrine more at length.

Though the counsel for the pannel was pleased to aver, That the idea of trying crimes committed in a foreign country, was totally unknown in the law of England, your Lordships will find, that the same idea long ago took place in that country. Wales was formerly a separate and independent kingdom, until it was brought under subjection to England by Edward I. By the *statutum Walliæ*, passed in the 12th year of his reign, it is enacted, "That the Welsh shall still enjoy their own laws, with some corrections which had been made upon them by the King and his nobles." At this time the two kingdoms were precisely in the same state that Scotland and England now are, subject to one sovereign, and governed by their own laws. By the act of the 26th Henry VIII. cap. 6. § 6. it is enacted, "That it shall be competent for the justices of jail-delivery, and of the peace, for the counties of England bordering upon Wales, to inquire into, and to try all crimes, felonies, &c. committed within the kingdom of Wales, in the same manner as if those crimes had been committed in the counties for which the aforesaid judges had their commission;" and particular directions are given for that purpose. It is true, that the next year the laws and liberties of England were communicatd to the Welsh; and particular judges are now appointed for trying crimes in that kingdom; but the act above quoted will satisfy the court, that the extension of jurisdiction contended for, had made its way into England, at a time when Wales was precisely in the same situation with regard to that kingdom that Scotland is now.

Another statute to the same purpose was passed in the 4th year of the reign of James I. He had by this time succeeded to the crown of England by the death of Queen Elisabeth; and it became the object of the legislature, to abolish all laws tending to maintain hostile

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principles

principles betwixt the nations. The 1st act of the 4th year of that King's reign, in the *first* place, repeals several of these hostile laws; then gives an indemnity for crimes committed on the borders before the King's accession; and then it is enacted, par. 27. That all crimes, and theft among the rest, "committed since his Majesty's coming
 "to the crown of England, or hereafter to be done or committed, by
 "any of his Majesty's natural-born subjects of this realm of Eng-
 "land, or the dominions of the same, within the realm of Scotland,
 "or the dominions thereof, and the accessories of and to the same,
 "shall be from henceforth inquired of, heard, and determined, be-
 "fore his Majesty's justices of assize, or his commissioners of oyer
 "and terminer, or gaol-delivery, being natural-born subjects with-
 "in this realm of England, and none other, by good and lawful
 "men of the counties of Cumberland, Northumberland, West-
 "morland, or any of the said counties, at the election of the said
 "justices of assizes, or commissioners, in like manner and form, to
 "all intents and purposes, the alterations hereafter in this act ex-
 "pressed only excepted, as if such offences had been done and com-
 "mitted within the same shire where they shall be so inquired of,
 "heard, and determined, as is aforesaid."

The act then proceeds to give directions for carrying this law into execution; and, among other things, it is provided, That the crime shall be laid in the indictment to have been committed within the kingdom of Scotland, according to the truth, and not in the county where the trial was brought. By the act 22. of the 13th and 14th of Charles II. a fund is provided for keeping a certain number of men for searching out and apprehending thieves upon the borders, and bringing them to justice: and, for that purpose, the act appoints the above-stated act of James I. to be revived and put into execution. This act of Charles II. is continued from time to time by a number of different statutes; and at last it is made perpetual by the 42d act of the 31st of George II.

The memorialist does not pretend to understand the law of Eng-
 land; nor can he say with certainty, whether this act of James I. is
 yet

yet in *viridi observantia*, or if many cases have of late occurred in which it has been tried; but he knows of one case that happened about three years ago on the east border, which has very much that appearance. A shop in Kelso, belonging to one Frazer, was broke, and a quantity of goods stolen out of it, by one Alder, an Englishman, near Hexham in Northumberland. Frazer, after much inquiry, found out Alder to be the thief, and part of the goods were found in his possession. The justice of peace bound over Frazer to prosecute, and took bail from Alder for his appearance. He was accordingly indicted at the next assizes at Newcastle, but did not think proper to appear; and therefore sentence of outlawry was pronounced against him, and his bail-bond was forfeited. When this case was mentioned at the hearing before your Lordships, it was said, That it could be of no authority, because this crime did not come to a trial. Notwithstanding this, the memorialist apprehends, that this case shows the idea the judges of England entertain of this point of jurisdiction. If it be clear, that no judge can try a crime committed without the bounds of his jurisdiction, the judges at the assizes would neither have pronounced sentence of outlawry against this man, nor forfeited his bail-bond; for the memorialist apprehends, that no court can even pronounce a sentence for contumacy, in a case in which it is clear, that they themselves have no jurisdiction. These acts, however, will satisfy your Lordships, that the English, as well as other nations, have adopted the equitable principle that is now maintained.

That the same opinion has made its way into the criminal law of Scotland, appears from the authority of Sir George Mackenzie, in his *Criminals*, part 2. tit. 2. par. 1. and 2. He first distinguishes the different *fora* where criminals may be tried, into the *forum delicti*, the *forum originis*, and the *forum domicilii*. And afterwards, in par. 2. he says, "The reason why the judges of that place where the delinquent dwells, is judge competent to the trial of the crime, is, because it is fit that the judge purge his own bounds and territory of evil-doers and malefactors, lest they affect others by their ex-

ample, or fall themselves to commit the like crimes there also." He then goes on to repeat and enforce the same doctrine, and then he takes notice of a distinction maintained by Calderas, That, in cases where both the place of the criminal's residence, and the place where the crime was committed, are subject to the same prince, though the jurisdiction be under different private judges, and the private territories different, the judge of the place where the delinquent dwells, may try a crime committed without his own territory, but not otherwise. This distinction, however, Sir George condemns, and insists upon the rule in general, for the reasons laid down in the above quotation.

The reasons and authorities above stated, demonstrate, that the criminal judges of any country have a power to try crimes committed without their own territory, when the delinquent is apprehended within it. Though, therefore, the pannel had committed a murder in England, or any other crime that was begun and ended in that kingdom, your Lordships have undoubtedly a jurisdiction to try him for that crime. The memorialist, however, has no occasion, in the present case, to plead the point so high; because the crime with which the pannel stands charged, was not consummated and ended in England, but is a *crimen continuum*, which was begun in England, and ended in Scotland. The pannel laid hold of the mares in question in England, and immediately carried them over the border; and when he was apprehended in Scotland, he had them in his possession, and was making off with them, to dispose of them for his own behoof. The crime, therefore, was not ended, when he had taken possession of the mares in the neighbourhood of Carlisle; but, after he entered Scotland, he was still carrying on the same crime, and was guilty of it every moment till he was apprehended, by having the stolen mares in his possession, and carrying them off, in order to dispose of them for his own benefit. As therefore he committed the crime of theft within the territory of this court, your Lordships undoubtedly have a jurisdiction to try him for that crime. This doctrine is so clear and convincing, that it is hardly necessary

to quote authorities in support of it. The memorialist, however, will lay before the court the opinions of some criminal lawyers upon that subject.

Carpzovius, in the place above quoted, par. 23. says, "Ex qua definitione porro sequitur, ubi delictum in distinctis territoriis fuerit consummatum, utriusque territorii dominum judicem delicti esse competentem, eatenus nempe quatenus crimen in suo territorio perpetratum et consummatum fuerit."

Mattheus, in the title above quoted, par. 8. gives his opinion in the following words. "Sed quoniam divisis territoriis perniciosior opinio invaluit, non immerito quæritur, cujus est animadversio, si, exempli gratia, alibi tormentum excussum, alibi transfixus homo fit; alibi falsum instrumentum scriptum, alibi productum; fit si alibi raptam, alibi stupraveris; alibi vinctum, alibi spoliaveris: et recte responsum judico, ab interpretibus in omnibus hisce exemplis, utriusque territorii judicem animadvertere posse."

Sir George Mackenzie is still more explicit upon this point: in the title above quoted, par. 1. he says, "Not only where the crime itself was fully committed, may it be tried, but where any part of it was committed; and therefore a thief may be judged, not only where he first broke the house, but by the judge of that place where he was taken with the things stolen." And afterwards, he adds, "For with us, where-ever a thief is taken with a fang, he may be hanged." Agreeable to these authorities is the practice of the court, in cases where crimes are committed, partly at land, and partly on the sea. The high admiral is his Majesty's lieutenant upon the seas; and, in many cases, his jurisdiction is exclusive of that of any other court. In several trials that have been brought before the court of justiciary, for crimes committed upon the seas, the jurisdiction of the court has been declined; and this declinature has sometimes been sustained: but where the crimes charged were of the nature of *crimina continua*, committed partly upon land, and partly upon the seas, your Lordships always sustained your own jurisdiction. Many decisions might be quoted to this purpose; but it is unnecessary

necessary to take up the time of the court upon a point that is so clear. Your Lordships will remember, particularly, the case of Gray and Jacobina Moir; the case of Johnston and others, for plundering a ship in the harbour of Anstruther; and the case of Robert Forsyth, and others, tried at the circuit-court at Aberdeen in May last, for robbing a ship lying in the harbour of Down of a quantity of meal.

These reasons and authorities will satisfy the court, that the pannel may be tried before your Lordships for the crime with which he stands charged; and the memorialist shall now take notice of the arguments that have been pleaded for the pannel in bar of this jurisdiction. And,

Ques. It was asked, By what law the pannel is to be tried? whether by the laws of Scotland, or of England? That the criminal laws of the two kingdoms are different in many particulars: That some things are crimes in the one kingdom, which are hardly punishable in the other: That the punishment of the same crimes is, in some cases, very different, in the different kingdoms: That your Lordships are not supposed to understand the laws of England; nor are you intitled to judge by them; and that it would be hard to try the pannel by the laws of Scotland, when he has not offended against them.

Ans. The pannel is to be tried, as the style of our indictment runs, *by the laws of God, of this, and all other well-governed realms.* No crimes can be tried in this manner, but what are punishable by the laws of God and man. Statutory or local crimes cannot be tried by the judges of a foreign country; but murder, robbery, horse-stealing, &c. are capital crimes all the world over; and the forms of trial are so similar in the two kingdoms, that the pannel can suffer no injustice by a trial in either. This inconveniency is particularly guarded against in another case. After the accession of James I. to the crown of England, statutes were made both in England and Scotland for delivering up criminals that should fly from the one kingdom to the other: and in both of these acts, (7th Ja. I. cap. 1. act 2.

1612), it is provided, That this can only be done when the crimes with which the fugitives are charged are crimes in both nations. In the same manner, it is only such crimes as are equally punishable in both kingdoms that can be tried by the judges of either; and horse-stealing is certainly one of the number. *2do*, The difficulty insisted on does not hit the present case; because the pannel has been guilty of horse-stealing in Scotland as well as England, as has been already pleaded. He can therefore undoubtedly be tried by the laws of Scotland for that crime.

2do, It was much insisted on, That such a jurisdiction cannot be in the court, because your Lordships have no power to explicate it: That you cannot compel English witnesses to appear to give their evidence either for or against the pannel; and therefore, in many cases, it may be impossible to carry on such a trial.

Ans. 1st, This argument, when taken in the strongest light, only shows, that there may sometimes be difficulties in explicating this jurisdiction; but it does not follow that your Lordships have no such jurisdiction. There are many cases, in which the court of justiciary, and other courts, have an undoubted power to judge in certain causes; yet it may be often impossible for them to explicate that power. English witnesses are necessary in many criminal trials, and yet your Lordships have no power to enforce their attendance. Suppose a crime is committed on the Scotch side of the border, and that all the witnesses are Englishmen, who happened to be accidentally present, your Lordships cannot force these witnesses to attend; and yet the jurisdiction of the court will not be disputed. Your Lordships have a power of transporting to America; and yet the criminal may escape from the ship after he has left Scotland, or he may return to England, or any other country, and you have no power to touch him. The court of session has an undoubted jurisdiction in certain foreign matters; and yet it is not in their power to force witnesses in a foreign country to give their evidence, or to produce writings that may be necessary in the cause. If the witnesses cannot be brought, the

the trial cannot proceed; but this does not demonstrate that your Lordships have not the jurisdiction.

2d^o, Many cases have occurred, in which English witnesses have been necessary; but no instance can be given of any trial's being stopped by their refusing to attend. Few people will refuse to appear on such an occasion, either for or against a pannel; and if they are backward, the justices of peace of England are always ready to compel them. The way commonly practised is, that on an application to the justice by any Scotch judge or magistrate, setting forth, that such a witness is necessary at such a trial, the justice sends for the witness, and obliges him to enact himself, under a proper penalty, to appear at the trial to give his testimony. This is a practice *in viridi observantia*, of which many instances can be given. English witnesses are frequently seen in the high court of justiciary; but this must naturally happen much oftener in the circuit-courts held at Jedburgh and Dumfries. The memorialist will mention two or three cases, which are known to some of your Lordships. In the trial of Fairbairn, seven or eight years ago, at Jedburgh, for house-breaking, English witnesses attended; and these were forced by Mr Selby, a justice of peace for Northumberland, to enact themselves to appear at the trial, at the desire of the sheriff of Roxburgh. In the case of Neilson, who was transported on a petition in May last at Dumfries, for stealing horses from England, several English witnesses attended; and they were obliged by Sir John Eden, a Cumberland justice, to enact themselves. In the trial of Douglas at Jedburgh last harvest-circuit, for horse-stealing, a number of English witnesses appeared on the part of the pannel to prove his exculpation.

Neither is this done only out of courtesy, but a foundation may be discovered for it in the above-quoted act 1. of the 4th of James I. In the 32d and 33d clauses, it is set forth, That an act similar to that above ingrossed was to be made in Scotland, for trying there Scotchmen who should commit crimes in England, and fly back into Scotland: And it is ordained, That on application from the party injured, the English judges, magistrates, or justices of peace, shall bind

bind over witnesses, prosecutors, &c. to attend at the trial; and that, if they fail, their recognisances shall be forfeited in exchequer. Though this act does not apply directly to this case; yet it is a very good foundation for a practice so reasonable. The counsel for the pannel talked much of *Magna Charta*, and the great crime it was to force any Englishman out of the country without his consent, unless by way of punishment. But the memorialist believes, that if a prosecution were brought against an English justice for such a *comitas* to a sister-nation, the judges would not think of inflicting any punishment; or if complaints were brought against a sheriff, or justice of peace, for following such a practice in Scotland, your Lordships would not find such complaint relevant. It may be possible that some justices may refuse this piece of courtesy: but among such a number as are in every county, some will always be found, who have regard enough for their neighbours to give them assistance. It is clear, therefore, that witnesses can always be procured; and if every jurisdiction is to be cut down that sometimes cannot be explicated, it is believed very few will remain.

3^{tho}, The counsel for the pannel talked of the articles of the union, as prohibiting trials of this kind. But your Lordships will pay no regard to that argument: these articles do by no means relate to cases like the present; they only enact, That law-suits arising in Scotland shall not be carried into Westminster-hall, nor those arising in England before the courts of Scotland; but that as each nation preserves its own laws, each of them too shall have separate courts.

4^{tho}, Neither is it at all to the purpose, what was mentioned with regard to the acts passed after the late rebellion, for trying the rebels in England. These acts do by no means show, that no crime committed in the one kingdom can be tried in the other; they were made for a particular purpose. The trials, in cases of treason, are very different from other trials: they are all carried on in the English form; the treasons must be laid to have happened in a particular county, and must be tried by a jury of that county. As it would have been attended with great inconveniencies to have courts going

up and down the whole kingdom, to try the rebels in every county where they were guilty, power is given to his Majesty to appoint his courts to sit at any place that is convenient for that purpose; and it is directed, that the treasons should be laid to have happened in the places where they were really committed, though not in the counties where they were tried. Besides this, these acts demonstrate, that courts may have a jurisdiction which they have not a certain power to explicate. There is no power given to the English judges by these acts to call witnesses out of Scotland; and therefore their attendance was merely voluntary.

It was admitted in the debate, that both in England and in Scotland, sheriffs, or the ordinary judges of counties, have a power to try crimes committed within other counties; and it was said, that many of the authorities quoted relate to provinces or subdivisions of the same empire, subject to the same prince, and governed by the same laws. But your Lordships will observe, that most of these authorities relate to nations that are foreign with regard to each other.

If it is law, that a sheriff can try a crime committed in a different county, the memorialist cannot see a solid reason why your Lordships, or any supreme criminal court, may not try a crime committed in a different kingdom. What is it that bars this power? It cannot be the strict idea of territorial jurisdiction that has been so much talked of; for it is as adverse to that idea, that a sheriff should try a crime committed in a neighbouring county, as that your Lordships should try a crime committed in a neighbouring kingdom. A sheriff has no direct authority beyond the limits of his county, more than your Lordships have beyond the limits of the kingdom. The only reason of the difference, therefore, must be, that a sheriff can obtain the aid of the superior courts for explicating his jurisdiction. This is only an argument drawn from inconveniency; which, as has been demonstrated above, cannot be conclusive with regard to the point of jurisdiction; because many instances can be given, where courts, both civil and criminal, have undoubted jurisdiction, in cases

cases in which they cannot be sure of explicating that jurisdiction upon every occasion.

The memorialist has thus laid before your Lordships, at great length, every thing that occurs to him upon this important point; and he can see no reason, why you should not sustain the jurisdiction of the court. A contrary decision might be attended with the worst consequences to both parts of the united kingdoms. If criminals, by flying from the one to the other, can escape the punishment due to their crimes, it would make the counties on both sides of the border very unsafe to live in. It is much for the interest of Britain in general, that such things should be prevented. And it can be attended with no bad consequences to pannels, to be tried in a supreme court, either in England or Scotland, where they are sure of meeting with impartial justice. If witnesses cannot be procured either for the prosecutor or the pannel, the trial cannot go on; and then, the only consequence will be, that the pannel must be sent over to the place where he committed the crime; which the memorialist will admit, is in many respects the most convenient *forum*: but what he maintains before your Lordships is, that this is not the only *forum*, but that the criminal may likewise be tried in the kingdom where he is apprehended; more especially when, as in the present case, the stolen goods are found in his possession.

The information for the pannel argued,

“The point of law to be determined is of very general concern; and as it is rather a question of the law of nations, than one which can be expected to be regulated by municipal laws and local constitutions, it will be proper to begin, by extending our views a little beyond that law which is positive and statutory, and to turn our eyes upon some of those great common principles by which distributive justice is regulated in human society.

And if, in the course of this argument, we shall have occasion to recur to a state of human nature, which perhaps we have no authority

ty from history to say ever existed; yet that is no more than what is always done in all disquisitions concerning political law, and natural jurisprudence. An imaginary condition of the human race is supposed, usually denominated a *state of nature*; and from considering mankind in that point of view, sound principles are borrowed, on which to reason concerning the attributes of civil society.

Let us suppose man then in a state of nature, and consider his situation with respect to distributive justice.

In such a state of the human race, it seems indisputable, there can be no idea of distributive justice; for where every man is his own judge, there is no compulsory power from without to make him follow that which is right, and avoid that which is wrong. The sole consequences of an evil action are remorse and regret, joined to a fear of some invisible power, which, if the man reasons at all, he must believe is a friend to what is right, and a foe to what is wrong. But those artificial consequences of an evil action which we denominate *punishments*, in such a state are altogether unknown: In a state of nature,

“*Peena metusque aberant, nec verba minacia fixo*

“*Ære legebantur, nec supplex turba timebat*

“*Judicis ora fui.*”

But when men were collected together in the social life, and each society was united by one common covenant of mutual protection and assistance, then distributive justice began to be known. A government of some nature or other was constituted; and to that government was committed the power of enforcing the ties of the social compact. The ends of the society, at their first union, were considered. Actions tending to promote those ends were denominated, in political language, *right*; and those actions, whose tendency was to invert and disappoint them, were denominated, in the same language, *wrong*.

The aim of distributive justice is to compel men to pursue those actions which are politically right, and to deter them from committing those which are politically wrong; and the method it takes, is to represent actions of the former kind as inseparably connected in their consequences with the happiness of the agent, and actions of the latter kind as equally inseparably connected with his misery.

In order to put it in the power of government to bestow on each action those consequences of happiness or misery which the law had determined it merited, certain artificial means of promoting human happiness and misery were invented, under the denomination of *rewards* and *punishments*; and courts were erected to distribute these among the members of the society, according to the ideas of the law concerning the merit or demerit of their actions.

But as the end of every society is answered, provided no member does any thing that is wrong, although none should exert themselves in an extraordinary manner in doing what is politically good; so the deterring men from counteracting the ends of society has been held sufficient in most governments. Hence the distribution of punishments has in general become the sole object of distributive justice among civil societies. The knowledge of the punishments which belong to every evil action hath been reduced into systems, and those systems have received the denomination of *criminal laws*.

As soon as civil society had been improved beyond the first and rude states of hunting and pasturage, and was advanced into the more refined ones of agriculture and commerce, societies, from being migratory and vagrant, became fixed and territorial. In these refined stages of society, territory necessarily became one of its inseparable attributes; and in time was an attribute so conspicuous, that from the name of the territory they possess, fixed societies have generally derived their names. Hence the distinction of empires, kingdoms, and commonwealths, borrowed from the country which the members of each society inhabited.

Though, after men were formed into civil societies, a common bond of union necessarily subsisted in each society, the nature and ties of

of which were pointed out in a body of laws belonging to the society; yet separate societies still continued independent of each other, and the several bodies collective were in the same situation as individuals must be supposed to have been while in a state of nature.

As the ends and aims of different civil societies were generally, in their original, different; so different principles, and contradictory maxims, necessarily regulated the system of criminal laws of different societies. Some societies originally united with a view to war and rapine; some for the peaceful enjoyment of extensive pastures and wide fields: others again were planned on the ideas of agriculture; others on those of commerce; and others were drawn together for the purpose of self-defence. Hence different forms of government were established, most suitable to those principles that had drawn the society together. These different governments necessarily produced a diversity in the systems of criminal law of the several societies; and that diversity was rendered more conspicuous by the views toward which the united efforts of the society were constantly tending.

Hence it became contrary to the nature of society itself, to admit the criminal law of one society to regulate the actions of the members of another: for, according to the different principles for which the several societies had originally united, and according to the nature of the different governments they had received among them, their criminal laws were different; often they were contradictory; and that action which was held laudable and meritorious in one society, was considered as a crime of the deepest dye in another, and a punishment inflicted upon it great in proportion to the demerit with which it was held to be attended. Thus the crimes of a warlike society must be essentially different from those actions that receive that denomination in a commercial state; the object of the former being a state of perpetual warfare with its neighbours, and that of the latter to cultivate a good understanding with all mankind. In like manner, the first principles of every other society will give a particular turn to its criminal law.

Hence, as soon as societies became fixed, the operations of criminal

nal law became territorial, and laws, like the societies who were tied by them, received their denominations from the territory where they prevailed; beyond that territory they could have no operation. Thus were the operations of the laws of Scotland, of England, of France, of Spain, and of every other independent state, limited to the territory of that state.

From these general principles it follows as a consequence, that what falls to be considered as a crime in any state, is punishable as such only within the state itself; for it is a crime only in so far as it is a transgression of the laws of the society to which the person who commits it belongs at the time he does commit it; if it is not punished by that society, no other can punish it. If the committer removes from the territory of the society, then he is beyond the operation of its laws. The crime he hath formerly committed cannot be the object of punishment in the society among which he now resides. He has committed no offence against their laws for which he can be punished; and while he continues to reside harmlessly and inoffensively among them, he must be suffered to reside peacefully and quietly; for till once he hath committed an offence against their laws, he cannot be punished by their courts of justice.

Thus on general principles the point in dispute is brought to a plain decision. The countries of Scotland and England were originally separate, independent, and unconnected states; each of them had their distinct body of laws, differing much in their genius and spirit; and as to criminal matters in particular, there will not perhaps be found two bodies of European law more different than they are. Though by the union those two states are more closely connected than formerly, yet still the same difference of law subsists. Hence, in matters of jurisprudence, the two states are as independent of each other as if no union whatever had been made.

The operations of the law of each is strictly territorial. The laws of England cannot affect any thing that is transacted in Scotland; nor can those of Scotland affect any thing that is done in England; consequently a crime committed in England, being no offence against

gainst the law of Scotland, cannot be tried in Scotland, nor before a Scotch court, who are ministers only of the Scotch law.

If these positions are just, then the pannel, who is an Englishman by birth, and who consequently was not originally subject to the jurisdiction of any Scotch court, cannot be tried in Scotland for an act which, even as his indictment lays it, was no offence against the laws of Scotland; but, if it was an offence at all, was an offence against the law of England alone, being committed against Englishmen, by an Englishman, and within the territory of England.

Were such a trial to proceed, by what law could it be judged of? Not by the law of Scotland surely; for there was no transgression of that law. If it is said, that it must proceed on the law of England; then is it, with all submission, denied, that your Lordships can proceed by that law. Your jurisdiction is derived from the law of Scotland alone. It is bestowed on you for the sole purpose of carrying the criminal law of this country into execution. It is inconsistent with the ideas of the law of England itself that you should proceed by it. Your court is unknown in the law-language of that country; you have no such commission as that under which it authorises the judges of its law to act; and therefore, were you to proceed on the law of England, that law would afford an unanswerable plea to your jurisdiction as judges.

And, indeed, were the law of England to be the rule of proceeding, this whole trial would be void and null, in so far as it hath already gone, and a new trial must be begun, according to the forms and regulations of the law of England, which, in a case like this, would be found to be inextricable; but on this it is unnecessary to multiply words.

Having said so much concerning general principles, it may be proper now to descend to particulars, and to consider whether there is any thing in the peculiar laws of Scotland or England, considered by themselves, that can give countenance for such a trial as is now brought.

For though it hath been shown above, that after society was formed,

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ed, the several independent states stood in the same relation to one another, as individuals must be supposed to have stood when in a state of nature; yet there is no doubt, that by mutual conventions between the states, certain connections might be introduced for their mutual benefit: and though the laws of neither could, strictly speaking, from their own nature, operate beyond their respective territories; yet such an operation, to a certain extent, for the benefit of both, might, doubtless, by mutual consent of their several legislatures, be introduced.

Let us inquire then, whether, by any mutual conventions, or by the consent of the legislature of either nation, general principles have been departed from in this point.

When the two kingdoms came to be so far connected as to have one king, though without any union of their legislative power, as hostilities ceased, it became a matter of mutual attention to keep the countries which lay on the frontiers of each quiet and peaceable. It was common at that time for depredations to be committed by the subjects of England who lived on the border, on the neighbouring counties of Scotland; and those again who lived on the Scotch side of the border, were in use to commit the like depredations on the border-counties in England.

With a view partly to abolish the memory of the hostility of former times, when the two nations had been under different kings, and partly to curb some of these disorders for the future, the statute 4^o Ja. VI. c. 1. was enacted.

And in so far as this statute was intended to check depredations, the method taken was, to make those depredations, or, which was the same thing, crimes committed by the subjects of England in the borders of Scotland, punishable by the laws of England: A method perfectly consistent with the general principles above laid down: for here none but the subjects of England were affected by the law of England; and the trial was to proceed within England, and to be conducted according to the forms of the law of England. The statute, therefore, introducing this part of the enactment, in § 26. pro-

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ceeds on this narrative: "And whereas, in regard some difference
 " and inequality in the laws, trials, and proceedings, in cases of life,
 " between the justice of the realm of England, and that of the realm
 " of Scotland, it appeareth to be most convenient, for the content-
 " ment and satisfaction of all his Majesty's subjects, to proceed with
 " all possible severity against such offenders, *in their own country, ac-*
 " *cording to the laws of the same, whereunto they are born and inherita-*
 " *ble, and by and before the natural-born subjects of the same realm.* if
 " they shall be there apprehended." From this narrative it is clear,
 that, under this statute, it was only such offenders as were natives
 of England, and not those who were natives of Scotland, that were
 intended to be made punishable by this statute for crimes committed
 within the realm of Scotland; and most properly, since the subjects
 of Scotland bore no allegiance to, and could not be bound by, the
 laws of England.

The statute then proceeds: "Be it therefore enacted, by the au-
 " thority foresaid, That all offences of conjurations, witchcraft,
 " and dealing with evil and wicked spirits, murder, manslaughter,
 " felonious burning of houses and corn, burglary, robbing of hou-
 " ses by day, robbery, theft, the detestable vice of buggery com-
 " mitted with mankind or beast, and rape, heretofore done and
 " committed since his Majesty's coming to the crown of England,
 " or hereafter to be done or committed, *by any of his Majesty's na-*
 " *tural-born subjects of this realm of England, or the dominions of the*
 " *same,* within the realm of Scotland, or the dominions thereof,
 " and the accessories of and to the same, shall be from henceforth
 " inquired of, heard, and determined, before his Majesty's justices
 " of assize, or his commissioners of oyer and terminer or gaol-deliv-
 " *ery, being natural-born subjects within this realm of England, and none*
 " *other,* by good and lawful men of the counties of Cumberland,
 " Northumberland, Westmoreland, or any of the said counties, at
 " the election of the said justices of assizes or commissioners, in like
 " manner and form, to all intents and purposes, (the alterations
 " hereafter in this act expressed only excepted), as if such offences
 " had

“ had been done and committed within the same shire where they
“ shall be so inquired of, heard, and determined, as is aforesaid.”
Taking, therefore, the whole of this statute, it is pretty evident,
that it is entirely an English law, to be carried into execution in
England alone, against the natives of England, and none other, al-
though it punishes acts committed in Scotland.

But, at the same time, it is clear from this act, that if any of the
natives or subjects of Scotland should happen to commit a crime in
Scotland, and afterwards go into England, they could not there be
tried for the offence they had committed, under this statute, as it can-
not be construed in any shape to apply to them.

It afterwards was thought a proper measure for civilizing the bor-
ders, that those who committed crimes in either country, and fled
into the other, should be sent back to that country where the crime
had been committed: and accordingly a statute was passed in Eng-
land, 7^{mo} Jacobi, c. 1.; whereby it was enacted, “ That if at any
“ time or times, after the end of this present session of parliament,
“ any person, or persons, shall commit any offence, or offences,
“ within the realm of Scotland, which, *by the laws of this realm of Eng-*
“ *land*, is, are, or shall be declared or adjudged to be petty treason,
“ murder, manslaughter, felonious burning of houses and corn,
“ burglary, robbing of houses by day, robbery, theft, or rape, and
“ do, or shall fly or escape into the realm of England, and be, or
“ shall be, apprehended within any of the counties of Northumber-
“ land, Cumberland, Westmoreland, or any parts or members of
“ the same, or within the parts or places lying on the north side of
“ the river of Tyne, commonly called or known by the names of
“ *Bedlingtonshire, Norhamshire, and Islandshire*, the town and county
“ of Newcastle upon Tyne, and the town of Berwick upon Tweed,
“ with the bounds and liberties thereof; that then it shall, and may
“ be lawful to and for the justices of assize, or any one of them in
“ the absence of the other, the justices of gaol-delivery, at their gaol-
“ delivery, or any four of them, or the justices of peace in their ge-
“ neral or quarter sessions, or any four of them, *upon due and mature*
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“*examination of the said offence or offences, in open sessions, and pregnant*
 “*proofs of the same, by warrant under their hands and seals, to re-*
 “*mand and send all and every such offender and offenders into the*
 “*realm of Scotland, there to receive their trial for any the offences a-*
 “*foresaid by them there committed.*”

It is remarkable, that when the legislature in England are thus ordering offenders to be sent back to take their trial in Scotland for the crimes that had been committed there, they do not make the law of Scotland the rule of judging of these crimes. They first consider whether the offender hath committed a crime according to the ideas of the law of England: if he had not, he was intitled to live there in full security; but if he had, he might then be sent back. This is a clear indication of the force of the general principles above mentioned in the municipal law of England, and how much that law considers the effect of municipal laws to be strictly territorial: for here the offender is not to be sent back merely because he had offended against the law of Scotland; the English would not allow that law to affect his personal security in England.

This statute was temporary; for it was appointed to continue only to the end of the then next session of parliament: it was besides clogged with a special provision in the following words: “*Provided ne-*
 “*vertheless, and be it enacted by the authority aforesaid, That this*
 “*statute, nor any clause therein contained, shall take effect or be in*
 “*force, or in any wise be deemed or expounded to take effect, to any*
 “*intent, construction, or purpose, until a law by act of parliament*
 “*be made and established within the realm of Scotland, for the re-*
 “*manding and sending out of the realm of Scotland into the realm*
 “*of England, all and every person and persons born within the realm*
 “*of Scotland, or the dominions of the same, which shall at any*
 “*time hereafter commit any the offences aforesaid within the realm*
 “*of England, to receive his or their trial in the realm of England,*
 “*for all and every the said offences by them committed in the said*
 “*realm of England.*”

The effect of this law, therefore, was suspended, until a condition should be performed by the legislature of Scotland; which was by no means an equal one: They required, that every person who should commit any thing which should be deemed an offence by the law of England, and should afterwards fly to Scotland, should be remanded; they therefore insisted, that the law of England should be the rule for remanding in both countries: and farther, although those who fled to England were only, to be remanded in case they were found on the north side of the Tyne, so that those who fled to the south of the Tyne were not to be remanded, a general act for remanding was required of the legislature of Scotland.

The consequences were what might be expected. The parliament of Scotland passed an act indeed; but it was an act, the force of which likewise was suspended till conditions should be performed by the legislature of England; and they too made the law of their own country the rule for judging, whether the persons who fled to them from England should be remanded there. The act passed by the parliament of Scotland is the statute 1612, c. 2.

By this statute, "Our Sovereign Lord, with advice and consent
"of the estates of parliament, statutes and ordains, That if, at any
"time after the end of this present session of parliament, any per-
"son or persons shall commit any crime or offence within the realm
"of England, *whilk, by the laws of the kingdom of Scotland, are, or*
"*shall be, declared or ordained to be* petty treason, murder, man-
"slaughter, felonious burning of houses or corn, burglary, robbing
"of houses by day, robbery, theft, or rapt, and shall flee or escape
"into this realm of Scotland, and be taken and apprehended with-
"in any part of the said kingdom of Scotland, bounds and domi-
"nions thereof, that then it may and shall be lawful to and for the
"justice-general and his ordinar depute, the sheriffs, stewards, lords
"and bailies of regalities, the commissioners of borders, or any two
"of them, in their ordinar courts, or the justices of peace in their
"general and quarter sessions, or any four of them, *upon due and*
"*mature examination of the said offence or offences, in open courts or ses-*
"sions,

sions, and pregnant proofs of the same, by warrant under their hands and seals, to remand and send all such offenders into the realm of England, there to receive their trial for any of the foresaid offences committed by them within the said realm of England, in manner above mentioned, notwithstanding any law, act, or constitution, made at any time heretofore to the contrair."

A clause, suspensive of the force of this act, is added similar to that in the English statute above mentioned; and it is required as a condition of this statute from the legislature of England, that they should authorise by a statute the remanding of offenders into *whatever part of England, or of the dominions belonging to it, they had fled.* This clause is in the following words: "Providing nevertheless, that this act, or any clause therein contained, shall not take effect, force, nor execution in any sort, except an law and act of parliament be made and established within the realm of England, in the first session of the next parliament thereof, for remanding and sending out of the said realm of England into the realm of Scotland, all persons who shall at any time hereafter commit any of the crimes or offences foresaid within the realm of Scotland, and thereafter flee into England, or any part of the dominions of the said kingdom, to receive their trial, and due examination, and punishment within the realm of Scotland, for every one of the saids offences committed by them within the said realm of Scotland, in manner before mentioned."

No such statute was ever enacted by the legislature of England as the one required to be enacted by the last clause of this act; of consequence this statute never took effect: in like manner, neither did the English statute 7^{mo} Jacobi, the condition required to give it effect never having existed.

But though none of these statutes took effect in so far as to constitute new law, yet they are of excellent use in declaring how the old and common law stood: for it seems without doubt, that the two last-mentioned statutes never would have been enacted, had it been possible, by the law of either country, to punish crimes committed

ted by the natives of another country at home, but who, after the crimes were committed, fled over the border.

And indeed it is expressly set forth in the preamble to the Scots statute 1612, That the law of Scotland, as it then stood, did not authorise the punishment of offences under such circumstances. The preamble of that statute is in these words: "Our Sovereigne Lord
"and estates of parliament, considering, that albeit the gude effects
"of his Majesty's cairful providence, to repress the innumerable disorders, crimes, and offences, whilks, before his happy attaining
"to the crown of England, were not only frequent, but almost ordinary in these bounds of the kingdoms of Scotland and England,
"(which then being the borders of the two kingdoms, are now become the middle shires thereof), hes reduced these parts to so gude
"progress of peace and obedience, as in so short time could hardly
"have been expected; nevertheless, it is founden by experience, that
"as well in these shires as in divers uthers parts of both kingdoms,
"some evil-disposed persons are emboldened to attempt and perpetrate many heinous crimes and offences upon hope of impunitie,
"if, after the committing of the same in one country, they may flee
"and escape to the other, and not be sent back to the place of their
"offence, the practise whereof has made many odious crimes and
"transgressions heretofore to remain unpunished, to the great contempt of his Majesty's authority, and universal grief of all gude
"subjects of both kingdoms."

This preamble deserves particular attention. It shows what the common law of both countries was at that time: it is no less an authority than a declaration of the Scots legislature with respect to the law of Scotland; by which it appears, if a man committed a crime in England, and afterwards escaped into Scotland, *impunity* was the consequence: this must therefore continue to be the law of Scotland still; for that statute, which was intended as a correctory law in this particular, did not take effect.

And as the preamble of the statute 1612 is an explicit authority with respect to the law of Scotland, so we have an authority equally explicit

explicit with respect to the law of England, in the preamble of a statute 13^o et 14^o Caroli II. c. 22. A troop of banditti, usually known by the name of *moss-troopers*, had infested the borders of Scotland and England; and the intention of that statute was to raise a fund for suppressing their depredations. The statute proceeds on the following preamble: "Whereas a great number of lewd, disorderly, and lawless persons, being thieves and robbers, who are commonly called *moss-troopers*, have successively, for many and sundry years last past, been bred, resided in, and frequented the borders of the two respective counties of Northumberland and Cumberland, and the next adjacent parts of Scotland; and they taking the opportunity of the large waste grounds, heaths, and mosses, and the many intricate and dangerous ways and by-paths in those parts, do usually, after the most notorious crimes committed by them, escape over from the one kingdom into the other respectively, and so avoid the hand of justice, IN REGARD THE OFFENCES DONE AND PERPETRATED IN THE ONE KINGDOM CANNOT BE PUNISHED IN THE OTHER."

And having so plain an authority in the words of the statute, it seems unnecessary to enter into any argument concerning the law of England on this point. It may be proper, however, to remove the effect of an observation that was made on this head on the part of the prosecutor.

It was said, That the law of England was no stranger to the idea of trying crimes committed in a foreign country within England; and the act of 26th Henry VIII. c. 6. was referred to; by which it was declared competent to try crimes committed in Wales within the counties bordering on Wales, in the same manner as if they had been committed within the county in England where they were to be tried.

But this statute, it will be found, being a temporary exception from the general rule, instead of weakening it, only serves to strengthen it. By the common law of England, crimes committed in Wales could not be punished in England; yet such was the barbarous and uncivilized

uncivilized state of Wales in the reign of Henry VIII. that there was a hazard justice might be frustrated, if this rule were strictly adhered to. The preamble of this statute sets forth, "Forasmuch as the people of Wales, and marches of the same, not dreading the good and wholesome laws and statutes of this realm, have of long time continued and persevered in perpetration and commission of divers and manifold thefts, murders, rebellions, wilful burnings of houses, and other scelerous deeds, and abominable malefacts, to the high displeasure of God, inquietation of the King's well-disposed subjects, and disturbance of the public weal; which malefacts and scelerous deeds be so rooted and fixed in the same people, that they be not like to cease, unless some sharp correction and punishment, for redress and amputation of the premisses, be provided, according to the demerits of the offenders:" and, among other extraordinary remedies, it introduces this as one, That offenders might be tried in the counties of England within which the King's writ runneth, nearest to Wales; for this very good reason, That there seems to have been no *tutus accessus* to hold courts of justice in Wales itself. It is a strong argument of the force of the general principle of law, That no crime committed in any other country could be tried within England, when the legislature were obliged to interpose; and without their interposition, no remedy could be applied under such glaring circumstances.

Thus, not only from general principles, but from the opinion of the legislative bodies of England and Scotland, clearly expressed in statutes, it appears to be a principle of the law of nations, which the municipal laws of Scotland and England have not derogated from, but confirmed, That the operations of the criminal law of every country are strictly territorial; that they bind only natives, and those living under the protection of them; and that, unless where it is otherwise specially provided, they extend only to acts committed within the territory. Hence acts done without the territory, by those who are not natives, come not under the cognisance of those laws: of consequence, the pannel, who was a native of England, is not ame-

nable in the criminal courts of this country, for any thing that he hath done in England.

Nay, though he were a native of Scotland; yet, as the genius and enactment of the Scots law stands, it would not call him in question for any thing that he hath done in foreign parts.

And here the pannel might rest his plea: for, as it is apprehended, the general principle upon which it is founded, is fully evinced; so nothing farther is requisite to be maintained on his part, to show, that the court hath no jurisdiction to try him for the crime charged in the indictment.

But as the prosecutor hath not argued the cause on his part on the same footing that the pannel hath argued it, it will be necessary to take under consideration the arguments that have been advanced on the other side; and to show, that they either do not relate to the case in hand, or else that they support the pannel's plea.

Before entering on the arguments of the prosecutor, it will be necessary to premise one general observation, which, if properly attended to, is of the utmost consequence in this cause, and overthrows all those authorities on which the prosecutor builds.

This observation is, That we must be most careful, in looking into authorities on this point, to distinguish between the idea of jurisdictions separated only by a boundary of country, without being likewise separated by the laws under which they are obliged to act, and those which are distinguished, not only by their extent, but by their laws. In other words, we must not confound the idea of separate jurisdictions which are a part of one sovereign state, and separate jurisdictions which belong to separate independent states.

Thus, in arguing on the Roman law, we must not think we have discovered a rule that would regulate the present question, if we find that a man who had committed a crime, for example, in Macedonia, while a province of the Roman empire, could be tried for it in Syria, or in Egypt, while provinces of the same empire. But we must inquire, what the Roman law would have authorised with respect to the trial of a crime at Rome, which had been committed, for example,

in Macedonia while a free and independent kingdom, under a Philip or an Alexander. If we can find nothing relative to this latter case in the Roman law, then can the Roman law afford us no aid in the present question.

This distinction being once laid down, and kept in view, it will be found, that none of all the authorities quoted on the part of the prosecutor can have the least weight in the present case. But they shall be more minutely considered, each in their order.

And, *first*, with regard to the quotations that have been made from the Civil law, all of them relate only to jurisdictions distinguished from each other by the territorial limits of the power of the magistrate, but which yet made both a part of one great state, the Roman empire, which were governed by one common law that was in observance in every part of it; and all the constitutions that can be quoted from the Roman law on the subject of the *forum competens delicti*, are no more than regulations for the internal administration of justice within the limits of the Roman empire. However it may sound, yet the question, Whether a man who had committed a crime in Italy, and fled to Britain, while Britain was a province of the Roman empire, was to be tried in Britain or Italy for that crime? is not intrinsically in the least different from this, Whether a man who commits a crime in the shire of Linlithgow, and flies into that of Edinburgh, is to be tried in the one county or the other? One common law governed both provinces; and where-ever the offence was committed, it was still an offence against that law.

But it is no where determined in the Roman law, whether, if any of the Garamantes, the Sarmatæ, the Indi, or the inhabitants of any other nation beyond the limits of the Roman empire, had committed a crime in their own country, and afterwards came to Rome, they could be tried for that crime there, or in any of the provinces of the Roman empire? Yet that would have been the only question in the Roman law that would have been similar to the present question with respect to us. The Roman law, therefore, can give us no light here.

The next authority the prosecutor has had recourse to, is that of Sande in his *Decisiones Frisicæ*. The very title of this work leaves us little room to imagine, that we are to learn any thing concerning the laws of nations from it. It is no more than a collection of decisions pronounced in one of the least populous provinces of Holland; and therefore no more than a series of determinations concerning a very limited body of municipal laws.

And indeed, when we look into the case for which this author is quoted, we shall find, that it imports nothing more than a determination concerning the privileges of a particular jurisdiction in Friesland, called *Ameland*.

Ameland is an island lying off the north coast of Friesland, and in reality a part of Friesland itself; it is governed by the same laws, but happens to be, a privileged jurisdiction within itself, having a lord of its own; so that in reality it is in the same situation with respect to the rest of Friesland, as, during the subsistence of heritable jurisdictions in this country, regalities were in with respect to the rest of Scotland.

A Frieslander was accused by the *procurator generalis* of Friesland, before the senate of Friesland, for a number of crimes committed, partly in Friesland, and partly in *Ameland*. He offered to go to trial with respect to the crimes committed in Friesland; but he entered a plea to the jurisdiction of the court with respect to the crimes committed in *Ameland*. His plea was over-ruled: the trial went on for the whole crimes; he was convicted, and executed.

This case related to the privileges of distinct jurisdictions, which are nevertheless parts of the same state, and governed by the same laws. It is precisely such a question as might have occurred during the subsistence of the heritable jurisdictions in this country, if an inhabitant of a regality had been indicted before your Lordships for crimes committed within the regality, and had, without being repledged by his lord, offered a plea to the jurisdiction of the court. There is no doubt but such a plea would have been over-ruled, and most justly.

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But this can never be argued on as a precedent with respect to the other question, concerning the power of the courts of one country to try crimes committed by the natives of another country, within the territory of an independent state governed by separate laws: or if it be, it is a precedent rather in favour of the argument pleaded by the pannel; for the Friesland mentioned in this decision had not only committed crimes in Friesland and in Ameland, but also at Dunkirk, and on the coasts of Holland: yet for none of these was he brought to his trial in Friesland; which allows us at least to presume, that the prevailing idea there was, he could not be tried for those crimes committed in foreign countries; else, as there seems to have been no want of inclination to accumulate crimes against him, he would have been brought to his trial for these also.

With respect to the reasoning of Sande himself, it is very indistinct and confused: for where he speaks of *duo principes vel liberae respublicae*, it is plain, that he means such as were governed by the same laws, though their jurisdiction was separate and supreme. However, it is needless to bestow much time on the consideration of Sande's opinion; for the whole senate of Friesland, far less a single Dutchman, will never be listened to by your Lordships in contradiction to the voice of the statutes of your own country.

As to Huber, who is the next authority that has been quoted by the prosecutor, little need be said concerning him. He is a writer of very mean authority; and in none of all his works is he of less than in his book *De jure civitatis*. It is not the commentator on the Pandects, but another Huber, who writes that book.

Carpzovius is also quoted as an authority in behalf of the prosecutor, in what he says concerning the *forum competens* for the trial of crimes. But his authority can be of no more weight than those above mentioned, since the same observations apply to it, viz. That he distinguishes between the territories of different judges acting under the same laws, not between the territories of independent states governed by different laws. A little attention will make this clear.

Carpzovius's book is intitled, *Practica nova Imperialis Saxonica rerum*

rum criminalium. It is in reality, then, a book treating of a particular, local, and municipal law; and whatever he gives as his opinion, or whatever he argues to be law, must be understood to relate to the Saxon law only. Where, therefore, he speaks of the *forum competent in delictis*, and inquires, whether it is the *locus delicti*, the *locus deprehensionis*, or the *locus domicilii*, he must be understood to treat of all these on the ideas of the law of Saxony only; and therefore, to proceed on the supposition, that which of them soever is the real *forum competent*, the trial there will be regulated by the ideas of the laws of Saxony: for, if that was not the case, it would not be within the plan of his book to treat of them. No aid therefore can be obtained from the principles laid down by this author, in the decision of the present question, which appears not to have been at all under his eye; and though it had, yet it is apprehended his authority would have but little weight with your Lordships, as you will never make the law of Saxony the rule of your procedure.

Matthæus has also been quoted, as affording an authority in behalf of the prosecutor. This writer is a commentator on the Civil law, his book *De criminibus* being a professed commentary on the 47th and 48th books of the Pandects. What has before been said, therefore, with respect to the texts of the Civil law itself, applies with greater force to the authority of Matthæus, who is no more than a second-hand retailer of these texts.

Such are the authorities brought in support of the general argument pleaded by the prosecutor; none of which, it is humbly apprehended, apply to the case in hand when duly considered; they therefore rather tend to perplex and confound us, than to give us any light in the discussion of the merits of the present question.

Were the same method to be followed on the part of the pannel, he too could bring into the field troops of learned commentators, *doctores utriusque juris, professores publici, et antecessores*; for there is not any point whatever upon which these gentlemen may not be mustered on both sides. On the part of the pannel might be quoted, *Farinacius, Prax. Crim. l. 1. tit. 1. q. 7. n. 2.*; *Ægid. Bossius, tit. De in-*

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quis. n. 67.; Capella, Conf. crim. 58. n. 22.; Covar. Pract. quest. 2. n. 6.; Socin. reg. 87.; Jodo, tit. De inquis. n. 4. et seqq. &c. &c. But it is truly a kind of insult on the laws of our own country, to cite such authorities in our courts. In a point that would confessedly fall to be determined by the Civil law, there is no question, that the arguments of an ingenious Civilian deserve attention and regard; but in a question not in the least connected with the Civil law of the Romans, and which, on the contrary, falls to be determined either on the first principles of right reason, or on the opinions declared by our own legislature, to have recourse to them, is absurd.

The prosecutor hath had recourse to Sir George Mackenzie, in his *Criminals*, under the title of *The Judge competent*. As that writer treats of the law of our own country, he is intitled to more attention and regard than writers on the law of Germany or Holland; but yet it will be found, that he does not aid the prosecutor in the least in the present question.

For, in the *first* place, The general observation that has formerly been made, applies to him as well as to the authorities that have already been quoted, viz. That he treats of the municipal laws of a particular country; and therefore, when he speaks of the territories of different judges, he must be understood to mean, that all the territories of which he speaks, are governed by that law of which he writes; and it hath been already shown, that the comparing the jurisdictions of different judges under these circumstances, can afford us no light in the present question.

In the *second* place, Sir George Mackenzie, who speaks his own opinion only, without quoting any thing to support it, can be of no authority in opposition to the opinion of the legislature, both expressed and implied in statutes, which, it hath been already shown, is in favour of the doctrine pleaded on the part of the pannel.

And, in the *third* place, It is very clear, from perusing Sir George Mackenzie, that he hath not had the *species facti* which is argued on in the present case, under his eye at all, even in treating of the competency of different territorial judges ruled by the same law. He

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treats of the competency of the *forum domicilii*, the *forum originis*, and the *forum delicti commissi*; but he never once mentions the *forum deprehensionis rei*. He says, that the *judex domicilii* may punish the person who resides within his jurisdiction, for crimes committed in another territory; but he does not put the case, of a person being accused of a crime said to be committed without the territory of the judge before whom he is accused, and when the person accused neither resides nor was born within the territory of that judge. Yet that is truly the question at present. The pannel is an Englishman; his residence always has been in England; the crime of which he is accused is said to have been committed in England: and yet he is accused before a Scotch court.

Before we leave the general point, there is a distinction which has been made by the prosecutor, which, as it is specious, may deserve to have a little attention paid it. It had been asked on the part of the pannel, If this trial were to proceed, by what law is it to be conducted, whether by the law of Scotland or England; since even the crime itself, and the essentials of the crime, might be different in the laws of the different countries? To this it was answered for the prosecutor, That the indictment runs, That the crime is punishable by the laws of God, and of this and all other well-governed realms: That no crimes to be tried under the circumstances in which this crime is proposed to be tried, are triable at all in this manner, but such as are punishable by the laws of God and man: That local crimes cannot indeed be tried in this manner; but murder, robbery, horse-stealing, &c. are capital crimes all the world over, and therefore may be tried in this manner.

The force of this argument hath already been obviated, in deducing our general principles, where it hath been shown, that punishment is altogether a creature of civil society; that all crimes, properly speaking, are local and statutory; and unless they are declared to be punishable by the laws of civil society, they are not punishable at all.

If we look into the history of mankind, we shall find this principle

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ciple supported by facts in the case of every one crime that can be mentioned. To begin with treason, which is the highest crime against society, it needs but to be mentioned to demonstrate, that it must be local and statutory, since the essentials requisite to form it must vary in different societies, according to the different modes of government received among them. Murder, though a crime, in the punishment of which the security of individuals is most deeply interested, is not every where punished with equal severity. Even in this our own country, in earlier times, it was not capital, but punishable by a certain fine, under the denomination of a *Cro.* In some countries, under certain circumstances, it hath not been punished at all; and in every country it has been necessary to define, with precision, by positive law, what it is that constitutes murder. In this particular, we frequently find the laws of different countries clashing. Thus, with us in Scotland, there must be an *animus occidendi* accompanying the giving the blow or wound: in England, it is sufficient, that the person who gave the blow or wound was *versans in illicito* at the time; for, if the person killing had a *felonious* intent in general, it is of no consequence whether he intended particularly to *kill* or not. Thus, as the laws of the two countries stand at the present day, one and the same act may be murder by the law of England, though it is not murder by the law of Scotland.

Robbery is a crime that, in many ages of the world, and in many countries, hath not been thought meritorious of a capital punishment: and as it is a complicated crime, made up of a mixture of force and theft; so, in every country, it hath required the aid of positive law to define what are its essentials; and the positive laws of different countries, even where robbery is declared to be a crime, and punishable capitally, will be found extremely different with respect to these. With us, every act of theft, accompanied with violence, is deemed robbery, the proper technical terms of our law for the crime being *flouthbrief*. Hence, if a man breaks violently into a house, and steals from it, that is robbery with us. If a man breaks into any repository, and steals out of it, that also is robbery. But

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in England, for example, there are certain other requisites annexed to the idea of robbery. Thus, robbery must be committed on the person of a man; that man must be put in fear of his life, &c. Without those requisites, there is no such thing as robbery by that law. If a man breaks violently into a house, and steals, he is guilty, not of robbery, but of burglary; which crime hath likewise its essential requisites, which it would be too tedious to enumerate. It is clear, however, from what has been said, that when a man is accused of robbery, either in England or Scotland, the local statutory constitutions of the country where the act has been committed, must determine whether he has been guilty of the crime or not; and, according to the circumstances of the case, it may happen that the very same act shall be robbery when committed in the one country, and not so when committed in the other.

And as to the crime of horse-stealing, which is the one more immediately charged in the present indictment, it is more apparently the creature of positive and local law, than any of the preceding. Theft hath been punished as a capital crime by the laws of some countries; by those of others, only by imprisonment, or a pecuniary mulct. In some, when properly conducted, it hath even been held meritorious, and attended with applause. Thus, among the Lacedemonians, immortal honours were paid to him who so carefully concealed the fox he had stolen, that he suffered him to prey on his bowels, rather than discover him; and, by the laws of Lycurgus, those youths who excelled in stealing, were publicly honoured and rewarded. By the laws of the Romans, restitution of fourfold or twofold value was the punishment of theft: and, even by our own law, simple theft is not a capital crime; it is only punishable by an arbitrary punishment; before it amounts to a capital crime, it must be what we call *aggravated theft*. And horse-stealing is not a separate crime; it is only an aggravation of theft, that horses have been stolen. With respect to our neighbouring country of England, it is believed the crime stands on another footing, the degree of punishment being determined by the value of the thing stolen: it is beyond

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a possibility of doubt, therefore, that the punishment of theft is altogether the object of local and statutory laws.

The prosecutor hath acknowledged, that no crimes are to be tried in this manner, but those that are punishable both by the laws of God and man. The laws of man are understood; they are the laws of the country where we live. But it were to be wished the prosecutor's idea of what is meant by the laws of God in the indictment, had been more fully explained.

If, by the laws of God, are meant the general revelations of his will made to all mankind, there will nothing in these be found determining theft to be punishable, or declaring what the punishment is. If, on the other hand, that body of laws promulgated to the Jews by Moses from divine inspiration, is understood, these will be fatal to the argument of the prosecution; for theft is not by these declared to be a capital crime; nay, it is not even declared to be a crime on account of which a corporal punishment is to be inflicted. On the contrary, by the Mosaical law, theft was expiated by restitution of double value; which, from analogy, would seem to be the object of a civil, rather than of a criminal action. In this sense of the law of God, therefore, according to the argument of the prosecutor, and on his own showing, the crime contained in this indictment, is one of those which cannot be brought to trial when committed in a foreign country.

But it hath already been shown, that there is truly nothing at all in this argument, since all crimes whatever, with the punishments attending them, must depend on local and municipal laws, adapted to the exigencies of each society and government, without being regulated by any general principles binding on separate and independent states.

The prosecutor, justly diffident of the general point, hath endeavoured to found an argument on a speciality in this case, viz. That the stolen goods were carried into Scotland, whereby, says he, the crime of the pannel became a *crimen continuum*; it was partly com-

mitted in England and partly in Scotland; and therefore may be punished here.

It must be confessed, that this argument is not easily understood. The term of a *crimen continuum* is a new one, it is not to be found in any writer in the law; and the use of new and undefined terms is very apt to involve and perplex the argument. Yet the meaning of the prosecutor is not wholly unintelligible; and it does not seem a difficult matter to show, that no argument can arise from the speciality on which he founds.

The crime of which the pannel is accused is theft; a crime universally understood, and not difficult to be defined. The essence of it consists in fraudulently apprehending the possession of the moveable property belonging to another, with a view of making profit of it: it is plain that the whole essentials of this crime must depend on the first apprehension of possession. If at that time the person who did so, had no evil intention; if the goods of which he apprehended possession did not belong to another, but to himself; no theft was committed; if it was otherwise, the theft was complete the moment possession was apprehended: of consequence, all the requisites and essentials of the crime existed in England, and all of them would fall to be determined by the law of England. In whom the property was vested, would be a question of the law of England; whether the possession was legally or illegally apprehended, would be a question of the same law.

Nay, even as to the essentials of the crime itself, there would be a considerable difference of the law of England and Scotland: for the nature of the crime will depend entirely upon the value of the goods stole by the law of England; whereas in Scotland, without any regard being had to the value, other circumstances would fall to be attended to, both to ascertain the nature of the crime, and the degree of punishment.

Hence, while by the two laws the same act may be variously interpreted, from the consideration of circumstances, which may be material with regard to the law of the one country, though immaterial

terial with regard to the law of the other, it seems clear, that we must have recourse to one or other law, to determine whether there was a crime or not.

And here the law of Scotland cannot aid us. The pannel, according to the shewing of the indictment, brought the horses into Scotland in his own possession: he therefore did not steal them in Scotland; nay, on the contrary, was there a question about the property depending, the property would be presumed to be his from the possession.

As therefore he did not steal them in Scotland, we must have recourse to the law of England, to determine whether he stole them or not; we must by that law determine whose property they were; we must by that law determine whether he feloniously took them away; we must by that law determine whether he hath committed grand or petty larceny in so doing; which, by the by, could not be done on this indictment, where the values are not charged; we must determine whether his offence is a felony, with or without benefit of clergy; in short, we must enter into a disquisition about foreign laws, concerning which this court has no jurisdiction to cognosce or determine.

If therefore your Lordships cannot determine, Whether the pannel committed a crime in England? or what the nature of that crime was? you cannot enter into the consideration of the question, Whether he was lawfully or unlawfully in possession of these horses in Scotland? because that depends upon the consideration of the previous question, which, it hath been already shown, your Lordships could not enter on the consideration of.

There is no foundation in law for saying, That the continuance in possession of the stolen goods, is a continuation of the act of theft. For either the theft is complete at the moment the possession is apprehended, or else it is not completed till afterwards. If it is completed immediately by apprehension of the possession, then is the full guilt incurred; the criminal is equally punishable, whether he resigns the possession in a day, or retains it a month: and it can make no difference

ence in the present case as to the pannel's guilt, whether the goods had been carried into Scotland, or he had made his escape into Scotland after parting with the goods; he cannot be triable here in the one case more than in the other.

If, on the other hand, it is said, the theft was not complete till he quitted the possession of the goods, then may it justly be said, that no thief could ever be tried or punished where the goods are taken in his possession; for the act of theft never had been completed by him: and, in particular, this might be pleaded from the face of the indictment in the present case, it being set forth, that the pannel was apprehended having in his possession the goods said to be stolen.

If, in the third place, it is contended, that the crime was constantly renewed and reiterated, by the pannel continuing in the possession of the stolen goods, it will be found, on examination, that this likewise is no solid foundation to build on. It is well known, that reiteration of theft is one of those aggravations which, by the law of Scotland, renders the crime capital, theft thrice repeated being a capital crime: it will therefore be a question of most considerable importance, how this reiteration, by retaining possession of the stolen goods, is to be interpreted? how long one must retain them in order to be guilty of a reiterated crime? and whether that reiteration can be considered to take place oftener than once? for the stealing of one single moveable may, by retaining possession thereof, become a capital crime, according to this argument of reiteration. To questions of this nature, no satisfying answer can be given; they serve therefore to demonstrate, that this idea of a reiteration of the crime, by retaining possession of the stolen goods, is altogether without foundation in the law.

From considering the nature of theft, then, it appears, that it is a crime of that nature that hath its existence in a moment; that it is completed by a single act; that it is incapable of being protracted by retaining possession of the stolen goods; that therefore the idea of the commission of this crime being protracted from the time that possession

session was first apprehended in England, during the whole time that the pannel continued in possession of the stolen goods, and consequently that theft was committed in Scotland, is altogether without foundation.

The whole statutes that have been mentioned and referred to on the general point, confirm the doctrine that is here pleaded for the pannel. It is well known in what manner the border-depredations were carried on; it was by making inroads, and carrying off effects from the one kingdom into the other; yet theft is mentioned in all these statutes; which shews, that even under these circumstances, theft committed in the one kingdom was held not to be punishable in the other. The statute 13^o et 14^o Car. II. which declares, in such strong terms, that offences done and perpetrated in the one kingdom could not be punished in the other, is relative to the moss-troopers, who are, in that statute, called *thieves and robbers*, and are said to avoid the hand of justice, by escaping from the one kingdom to the other. It cannot be doubted, that they carried their stolen goods along with them when they so escaped, as they are represented to have frequented solitary and sequestered places during the time they were perpetrating their crimes; so that it cannot be supposed, that they had disposed of the stolen goods before they made their escape out of that kingdom where they stole them; nor indeed is this agreeable to the practice of such marauders.

The authority that hath been quoted from Sir George Mackenzie on this head, relates entirely to our own municipal law, viz. That where a thief is taken with the fang, he may be hanged. But that proceeds on the supposition, that both the theft was committed, and the thief taken, within the territory of Scotland, where the law of Scotland takes place; the regulation about thieves taken with the fang, belonging properly to inferior judges, such as sheriffs and barons; who were empowered to judge of theft committed without their territory, in prosecutions brought at the instance of their procurator-fiscal, only in case the fang was found with the thief, even though the thief resided within their jurisdiction, that such prosecutions might

might not be brought on too slight evidence, or from the avidity of an escheat, which accrued to the sheriff or baron himself; though, if the private party injured insisted in the prosecution, they might punish whether the fang was found with the thief or not.

As to the quotations from Carpzovius and Matthæus, that have been used on the part of the prosecutor, all of these relate to crimes perpetrated, not by a single act, but which consisted in a multiplicity of acts, all constituting the same crime, perpetrated partly in one, partly in another territory or jurisdiction. And the same observation may be made with respect to the precedents of Gray, Johnston, and Forsyth, quoted from the records of this court.

Gray was indicted for the *crimen raptus*, or forcible abduction of Jacobina Moir [N^o 59.], which was committed, partly on the land, and partly within the sea-mark; consequently it was pleaded, that a part of the crimes libelled were committed, not within the jurisdiction of this court, but of the court of admiralty. The same was the case of Johnston and Forsyth, who had raised mobs and unlawful convocations of the lieges on the land, had plundered ships of their cargoes, and brought these cargoes ashore, where they had destroyed or disposed of them.

In all these cases there was this speciality, that no part of these crimes was strictly maritime, and such as could be committed at sea only. They all might have been committed at land as well as at sea. Now, although the jurisdiction of the high court of admiralty is privative, and independent of that of your Lordships in all cases that are strictly maritime, and which can be committed on the high seas only, such as piracy, sinking of ships at sea, &c; yet in those crimes that are offences against the law of Scotland, and which may be committed by land as well as by sea, such as murder on the high seas, &c. though the high court of admiralty exercises a privative jurisdiction in the first instance, yet that jurisdiction is subject to the controul of your Lordships in the second instance. You have been in use to review the sentences of the judge-admiral; and there are instances where you have altered them. You do therefore in reality possess

possess a jurisdiction in these matters; and where they are inseparably connected with other matters, that unquestionably belong to your jurisdiction in the first instance, it is more natural that you should judge of both, than that facts in themselves constituting but one crime, should be divided, and judged of and examined in different courts in the first instance, when, in the second instance, the whole would be subject to the review of your Lordships.

But where facts have happened altogether beyond the bounds of the jurisdiction of any courts in this country, it is humbly apprehended, they never can fall within the cognisance of any of the courts belonging to this country. Thus, if two persons should quarrel in France or Italy, both of them French or Italians, one of them should stab the other, and the person stabbed should afterwards come into this country and die; yet the stabber, though he afterwards was found in this country, could not be tried here.

That this is the case with respect to the law of this country, it is humbly apprehended, follows from what has been said above, both on general principles, and the opinion of the legislature expressed and implied in statutes. The act that occasioned the death happening in a foreign country, and nothing being done here that could produce that effect, the crime must be considered to be altogether foreign, and cannot fall under the cognisance of the courts of this country.

As it does not appear any crime, under these circumstances, has been brought to trial in this country, there is no opportunity of shewing what the opinion of our courts has been concerning them; but if we may borrow an instance from the law of England, we have a clear and explicit one, both in the judgements of their courts, and even in the opinion of the legislature itself.

The jurisdiction of the judge of the high court of admiralty in England, stands on a different footing with respect to their courts of common law, from what the jurisdiction of our high court of admiralty does with respect to your Lordships; the two courts are separate and unconnected, as much as if they actually belonged to separate independent governments, their jurisdiction being limited by

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the boundary of land and sea, and their procedure being regulated by different forms and ideas of law.

Now Lord Chief Justice Hale, in his History of the Pleas of the Crown, tells us, "If a mortal stroke be given on the high sea, and the party comes to land in England and die, the admiral shall not have jurisdiction in this case to try the felon; because the death that consummated the felony happened upon the land; nor the common law shall not try him; because the stroke that made the offence was not *infra corpus comitatus*, 5 Co. Rep. 106. b. Sir Harry Constable's case, 2 Co. Rep. 93. a. Bingham's case, Co. p. 6. p. 48. and Lacie's case, 25^o Eliz. cited there to that purpose."

And this continued to be the law of England down to the 2d of Geo. II. when by a statute, being the 21st of that year, it was expressly enacted, That if either the stroke or the death should happen within England, it should be sufficient to constitute the crime of murder, and to make that crime triable in the courts of common law in England.

The necessity of this statute in the law of England, together with the decision above mentioned, sufficiently show how that law stands with respect to the taking cognisance of facts in a foreign country with a view to the effects they may produce at home. Such a procedure, it is clear, is altogether adverse to the genius of the law of that country; although they have been obliged, for the security of their persons, to admit of it in the special case of murder; and as the ideas of any local laws, with regard to the law of nations, cannot fail being of use in interpreting the law of nations, it is humbly apprehended, this little digression into the law of England is not improperly brought in here; more especially, as we have had occasion to remark the similarity of the ideas of the laws of England and Scotland, with respect to crimes committed within the territory of each other.

The prosecutor hath indeed alledged, That crimes which are committed in this country may be tried in England; and he hath quoted, as an instance of this, a case where one was outlawed there, on ac-

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count of his not appearing to stand trial for such a crime. But the answer to this is twofold. If the act 4th Jacobi is still in force, natives of England may be tried under that statute for particular crimes committed by them in Scotland; and, in the second place, outlawry for non-appearance, is not like a judgement overruling a plea to the jurisdiction of the court. Had this pannel fled, and not appeared to answer to his indictment when called, he would of course been outlawed or fugitated; but that could never have been quoted hereafter as a precedent sustaining the jurisdiction of the court in any future case.

The nature of the thing is such, that there seems not the least reason to doubt, that, by our law, your Lordships have no jurisdiction to judge of crimes committed beyond the limits of Scotland.

It is an undoubted maxim in law, That *ubi jurisdictio concessa est, ea quoque concessa sunt sine quibus jurisdictio explicari nequit*. From this one may safely argue, that where-ever a court is found wanting a power to explicate a jurisdiction in a particular point, no such jurisdiction resides in that court.

Now, of all the powers necessary to explicate a jurisdiction, the power of procuring evidence of disputed matters of fact is one of the most conspicuous: *Ex facto jus oritur*: without investigating the fact, no determination in law can be given. If, therefore, it shall be found, that your Lordships jurisdiction is insufficient to investigate the matter of fact, with respect to crimes that have been committed beyond the limits of the territory of Scotland, then it is humbly apprehended, it follows as a necessary consequence, that you can have no jurisdiction with respect to such crimes.

Your Lordships are tied down in your procedure by very strict forms, and in no one particular are your forms more strict than with regard to the method of taking and judging of evidence. You can form no opinion yourselves of facts; all matters of fact must be tried before you by a jury, who must return their verdict concerning them; and their verdict is the only medium through which the law permits the court to view matter of fact at all. That verdict is de-

and being once given, it can neither be overturned nor altered, but remains a perpetual rule for determining the question at issue. And as the law gives such weight to the verdict of a jury in your Lordships court, so it will not allow that jury to use any other means of information than the very best possible. They must hear with their own ears; they must see with their own eyes; they can take nothing on trust, or at second-hand from others. For this reason, the statute 1587, chap. 9th has expressly enacted, "That the hail accusation, reasoning, writs, witnesses, and other probation and instruction whatsoever of the crime, shall be alledged, reasoned, and deduced to the affize, in presence of the party accused, in face of judgement, and na urtherways." And this statute, ever since the date thereof, hath continued a fixed and invariable rule of procedure.

Hence it follows, that your Lordships have no power to take evidence by commission, or by any other device of law to delegate your jurisdiction. For this purpose, every thing must be done in court, and in presence of the jury.

Now, when a fact is committed in a foreign country, by what means is it possible, under these forms of procedure, to enable a jury to give a verdict according to the truth? It is not to be presumed, that witnesses will take the trouble to travel from foreign countries into this, merely to give evidence concerning a matter of fact: their willingness to do so would even be an objection against them when they came, and would argue them too keenly interested in the matter at issue to be trusted as unprejudiced and impartial evidences; and any methods of bringing them here by the hopes of fee and reward would make them still more exceptionable.

That they could not be compelled to come here by virtue of any diligence issuing from the court, seems abundantly clear; for they might with safety condemn that diligence: *Extra territorium jus dicti impune non paretur*.

The prosecutor indeed hath pretended to say, that we might expect so much *comitas* from the magistrates of our neighbouring country

of England, as that they would compel witnesses to attend here when it was judged necessary that they should be examined by your Lordships. It was contended, in particular, that under the act 4^o Jacobi, this might be done; and, in fact, it was said, that sometimes it had been done. These answers that have been made on the part of the prosecutor, may deserve a little consideration.

It is a maxim of the law of England, That no man can be sent out of the kingdom by any authority whatever, without his own consent, or by act of parliament. This is founded on the 29th chapter of *Magna Charta*; and Lord Coke, in his commentary on this chapter of *Magna Charta*, tells us, "This is a beneficial law, and is construed benignly, and therefore the King cannot send any subject of England against his will to serve him out of this realm; for that should be an exile, and he should *perdere patriam*. No, he cannot be sent against his will into Ireland to serve the King as his deputy there, because it is out of the realm of England: for if the King might send him out of this realm to any place, then, under pretence of service, as ambassador or the like, he might send him into the furthest part of the world, which being an exile, is prohibited by this act."

And this maxim is farther enforced, and the observance of it fortified by penalties against the contraveners, by the act 31^o Car. II. c. 12. commonly called the *Habeas Corpus* act, whereby it is provided, "That no subject of this realm, that now is, or hereafter shall be, an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall, or may, be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are, or at any time hereafter shall be, within or without the dominions of his Majesty, his heirs, or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal; and that, if any of the said subjects now is, or hereafter shall be so imprisoned, every such person or persons so imprisoned shall, and may, for every such imprisonment, maintain, by virtue of
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"this act, an action, or actions, of false imprisonment, in any of
 "his Majesty's courts of record, against the person or persons by
 "whom he or she shall be so committed, detained, imprisoned, sent
 "prisoner, or transported, contrary to the true meaning of this act;
 "and against all or any person or persons that shall frame, con-
 "trive, write, seal, or countersign, any warrant or writing for such
 "commitment, detainer, imprisonment, or transportation, or shall
 "be advising, aiding, or assisting in the same, or any of them; and
 "the plaintiff, in every such action, shall have judgement to recover
 "his treble costs, beside damages; which damages, so to be given,
 "shall not be less than L. 500; in which action, no delay, stay, or
 "stop, of proceeding, by rule, order, or command, nor no injunc-
 "tion, protection, or privilege whatsoever, nor any more than one
 "imparlance, shall be allowed, excepting such rule of the court
 "wherein the action shall depend, made in open court, as shall be
 "thought in justice necessary, for special cause to be expressed in the
 "said rule; and the person or persons who shall knowingly frame,
 "contrive, write, seal, or countersign, any warrant for such com-
 "mitment, detainer, or transportation, or shall so commit, detain,
 "imprison, or transport, any person or persons, contrary to this
 "act, or be any ways advising, aiding, or assisting therein, being
 "lawfully convicted thereof, shall be disabled from thenceforth to
 "bear any office of trust or profit within the said realm of England,
 "dominion of Wales, or town of Berwick upon Tweed, or any of
 "the islands, territories, or dominions, thereunto belonging; and
 "shall incur and sustain the pains, penalties, and forfeitures limit-
 "ed, ordained, and provided, in and by the statute of provision and
 "*præmunire*, made in the 16th year of King Richard II. and be in-
 "capable of any pardon from the King, his heirs, or successors, of
 "the said forfeitures, losses, or disabilities, or any of them."

From these laws, it is clear, that it is not so light a thing as the
 prosecutor is inclinable to represent it, to send a man out of the realm
 of England, contrary to his inclination, for any cause whatever. The
 judges of England, in such a case, could not avoid inflicting the pu-
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nishment of this statute, in the same manner as the court of session could not avoid inflicting the penalties of the statute 1701, upon any magistrate within Scotland who should pretend to send any person out of the realm of Scotland, unless by his own consent, or by a sentence of transportation, after due conviction for a crime, such an offence being expressly declared punishable by the statute 1701.

But the prosecutor hath had recourse to the statute 4^o Jacobi, c. 1. and contends, That under that statute an English magistrate may bind over a witness to appear in a Scotch court by a recognisance, which will be forfeited, if the witness does not appear and give evidence. To this, however, a variety of answers occur.

And, in the *first* place, This statute is long prior to the one last quoted; it is not excepted from it; and therefore, as the last-mentioned statute, 31^o Car. II. is general, it seems to be a virtual repeal of the act 4^o Jacobi, c. 1.

In the *second* place, That part of the act 4^o Jacobi, c. 1. which is now the subject of our consideration, was enacted for a purpose which never did exist. It was expected at that time, that the legislature of Scotland would make a law for the trial of Scotchmen who passed over into England, committed crimes there, and afterwards returned into their own country; and it was only in order to oblige persons residing in England to appear and give evidence in Scotland, at trials for crimes of that nature, that this part of the statute 4^o Jacobi was enacted. The act itself proceeds on a recital of this: for, in § 32. it is said, "And forasmuch as it is intended, that an act like unto this shall be ordained in the realm of Scotland for the trial and punishment of offenders, being his Majesty's natural-born subjects of the same realm, which shall commit any of the offences aforesaid within the realm of England, or the dominions thereof, and shall after escape or return back into Scotland." Now the statute that is here said to be intended, never was passed in Scotland; and therefore, as the view with which the English statute was made, never was carried into execution, the statute can be of no force.

But farther, when the words of the enacting part of the statute

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are considered, they will not apply to the present trial, nor to any one under similar circumstances. For your Lordships will observe, that the person under trial here is an Englishman, a natural-born subject of the realm of England; whereas the effect of that statute is expressly limited to the case of trials of natural-born subjects of the realm of Scotland. The enacting words are these: "Be it therefore
 " enacted, by the authority aforesaid, *That, upon complaint made by*
 " *any his Majesty's subjects of the realm of England,* to any of the ju-
 " stices of assize, commissioners of oyer and terminer, or gaol-de-
 " livery, or justice of the peace within the precincts of their several
 " commissions respectively, being natural-born subjects within the
 " realm of England, concerning any such offence *committed by any of*
 " *his subjects of the realm of Scotland* within the realm of England,
 " in case where the offender is returned into the realm of Scotland,
 " as aforesaid, the said justice or commissioner shall have full power
 " and authority to bind over, as well the said party complaining or
 " prosecuting, as any witnesses that he shall desire to produce, (so as
 " their reasonable charges be first tendered to them), by recogni-
 " fance in a convenient sum to his Majesty's use, to prosecute and
 " give in evidence within the realm of Scotland; wherein, if de-
 " fault shall be made, and the same proved, by certificate, or o-
 " therwise, before the Lord Treasurer, Chancellor, and Barons of
 " Exchequer, or any of them, in the exchequer-chamber, and a de-
 " cree there made, that the same recognisance shall stand forfeited;
 " then the court of exchequer shall thereupon proceed for the levy-
 " ing of the debt of the said recognisance, as if it were adjudged
 " forfeited by the course of the common law." From this clause of the statute, it is clear, that the legislature of England did not hold, that an Englishman could be tried in Scotland for any offence committed in England; and accordingly, they did not extend the *comitas* of forcing witnesses to attend the courts in Scotland to the case of such trials.

In a trial like the present, therefore, it is impossible to procure the attendance of the necessary witnesses without their own consent; and the

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the circumstance of their ultroneously attending the trial, would in the eye of law by no means afford a presumption in favour of their evidence.

The prosecutor hath treated this matter, of the impossibility of procuring evidence, as an objection of no great consequence. It hath been said, That the want of proper evidence is an accident that must often happen in the course of human affairs; that witnesses may die; that they may leave the country; and, consequently, it may become impossible to compel their attendance; that, nevertheless, courts of judicature must go on in their usual course, and trials must proceed, notwithstanding such accidents.

But these accidents are very unlike to that total defect of evidence that must necessarily attend trials brought in the circumstances of the present one. On all occasions the purposes of justice could not be answered, were trials on all occasions to be barred, by the accident of witnesses dying; for the furtherance of public justice, therefore, it is, that trials should proceed in such circumstances. And there can be little hazard, that innocent men should suffer from the consequence of such accidents; because the guilt must be proved on the part of the prosecutor by unexceptionable witnesses, before it becomes necessary to prove any thing in exculpation; and when the circumstances of the case are such, that all the unexceptionable witnesses, except those who are under the influence of accidents, may be compelled to attend, no bad consequences can well happen. By accident, perhaps, the prosecutor may be prevented from proving his libel; but if witnesses have only left the country, that accident may be remedied by a delay; or if it is of the nature of those accidents that cannot be remedied at all, that the guilty should at a particular time escape by accident, is an evil that the law will often permit, much rather than that the innocent should perish.

But for what end could the law permit a trial to proceed, where the almost necessary and unavoidable consequences must be, that in every case there will be a defect of evidence, and neither the court nor the jury will have it in their power to find out the truth? Trials

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of this kind never can answer the end either of public or of private justice; they could only serve as snares to the innocent: and though, perhaps, by means of them, a guilty person might sometimes receive the just demerits of his evil actions; yet it would often happen otherwise. Endless would be the opportunities of gratifying the most deadly malice and resentment. In this manner, a person who bore malice towards another, need only accuse him of a crime committed in a foreign country; his own evidence, and that of another, would serve to convict him; while the poor man, however capable of bringing the clearest proof of his innocence, must nevertheless succumb under the accusation, because he cannot compel the attendance of witnesses to prove it.

And of all crimes said to be committed in a foreign country, the accusation of theft is the most to be dreaded for its consequences. For if any two persons follow a man into this country, they may pretend, that all the effects he hath about him is stolen from them. Their evidence would be sufficient to convict him; he cannot compel foreigners to attend to prove his exculpation. If the trial can proceed, the man may be executed, however innocent, and the accusers enriched with his spoils, under the pretext of their having been stolen from them.

Trials of this nature, therefore, are contrary to the very end of criminal law: instead of being subservient to the ends of justice, much injustice may arise in consequence of them.

The prosecutor endeavoured to draw a parallel between the jurisdiction of civil courts and that of criminal courts. He argued, That the idea of civil jurisdiction was, in its origin, as strictly territorial as that of criminal jurisdiction was; that nevertheless, from a *comitas* that hath prevailed among nations, the ideas of the laws of the several countries of Europe have gradually relaxed in this respect; that we have admitted men to sue on foreign contracts, and for implement of obligations contracted in foreign countries; and the question hath been put, Why ought not the same enlargement of ideas to take place with respect to criminal as with respect to civil jurisdiction?

dition? why may not a foreign act be made a subject of trial in a criminal court, as well as a ground of action in a civil court?

This parallel is specious and plausible, and therefore deserves to be considered.

The objects both of criminal and civil courts in the ruder ages of society were the same, viz. to preserve society in quiet and tranquillity. The end of criminal law was to deter men from crimes, by inflicting punishment; the end of civil law was to distribute property, and to secure men in the enjoyment of it. The former was executed by criminal courts; the latter by civil courts; who were instituted, that men might not fall together by the ears about their property, and by that means the bands of society be dissolved.

Both of these ends were answered by a jurisdiction strictly territorial, and by a law merely statutory, till society began to advance in refinement. But when commerce was introduced, by which means questions about property arose, not only among the members of the same society, but of different societies, and the laws of those societies were found to clash in determining those questions, neither a law merely statutory, nor a jurisdiction merely territorial, was found sufficient for the determination of such disputes; something must be called in to the aid of both.

In such disputes, therefore, equity was resorted to; by which the rigorous maxims of laws merely local and statutory, were softened, and rendered pliable to more general purposes than those for which they had at first been intended: and, from principles of equity, actions were indulged on foreign contracts and foreign deeds. But these actions were not brought in the courts of common law, whose jurisdictions still continued strictly territorial, but in courts who were vested with powers to apply the maxims of equity to correct the bad consequences arising from the limited nature of common law, to give redress in cases which the common law could not reach, and to support the common law itself, where its own resources were insufficient to answer its ends.

It is foreign to the purpose of this information, else it would be

no difficult task, to trace the history of this branch of equity which gives action on foreign contracts, so as to render them effectual in this country. It is sufficient at present to observe, that this is no part of the province of the courts of law properly so called: that accordingly all those courts whose jurisdictions are regulated by the common law only, have no power to interfere in such matters: such actions belong to courts of equity alone; and the procedure, in all such actions, is not regulated by maxims of law, but of equity. Writings will be received in them as evidence, which would go for nothing in a question which had its origin within this country; because, in that case, they would be improbativ by the law of Scotland.

It is not, therefore, that the jurisdiction of the courts of law are enlarged, and from being rendered territorial, become universal, that actions on foreign deeds and foreign contracts are given; but it is, because independent societies being united by commerce, and that commerce producing a certain *comitas* or mutual relation between the subjects of independent states, equity is called in to foster and cherish this *comitas*, and actions in equity are introduced, in order to strengthen the ties of this relation. Accordingly, the forms of a court of equity are planned, not on local constitutions or territorial ideas, but on general principles of reason common to the whole human race; and where facts are to be investigated, a court of equity is not tied down by those rules of evidence which bind a court of common law. It does not derogate from the testimony of a witness, that he is not personally present in court: a commission to examine him may be sent to the most distant part of the world, and his testimony may be received by means of a delegation of the power of the court. Accordingly, in every court of equity, the examining witnesses by commission makes always a conspicuous part of their form of procedure.

The introduction of these equitable powers do not in the least alter the nature of the jurisdiction of the courts of common law, even though the equitable powers themselves should be given to
courts

courts of common law; for maxims of equity ought not to be applied to proceedings at common law, otherwise every thing must run into confusion.

And, in particular, equity never can interfere in the proceedings of courts of criminal law. These, in all cases, must be regulated by common law; for there is no such thing as security or freedom where a man may lose his life, or be subjected to punishment, for any thing which the public law hath not declared a crime. And it was well observed by a late Right Honourable Judge in equity, That he knew of no equity whereby a man might be hanged.

All questions in criminal courts, therefore, are questions in strict law. All trials in criminal courts are regulated by the maxims of strict law; equity cannot be interposed in these courts; they remain on the same simple and limited footing on which they were originally constituted; their views are limited to preserving the peace of society within their own territory; and they cannot take cognisance of any thing that happens beyond it.

The comparison, therefore, of civil and criminal jurisdictions, as to actions on foreign matters, is rather of advantage to the argument of the pannel than otherwise. The equitable powers that have been given to civil courts, have enabled them to take foreign matters under their cognisance; whereas the absolute incompatibility of equitable powers with criminal jurisdiction, must always prove a bar to the introduction of foreign matters into criminal courts, unless in cases where the subjects of their territory are prohibited by special statute from committing particular acts in foreign parts, in which case such acts become crimes by the law of the territory.

The prosecutor argued, That in those cases where evidence could not easily be procured, there was still a remedy, by sending home the criminal to the country from which he had come; and it was contended, that it was optional in the court either to try him themselves, if evidence was at hand, or to send him back to his own country, if evidence could not readily be had here. It hath already been shown, that the trial can in no case proceed here; and, it is apprehended,

apprehended, that it is as clear, that no person can be sent out of this country to that from which he has come, merely because it is said he hath committed a crime there.

We have already had occasion to observe, that, during the reign of James VI. of Scotland, and I. of England, fundry attempts were made by the legislature of both countries to establish a fixed and certain rule for remanding criminals, who had fled over the border for security, to the respective countries from which they had fled. We have seen, likewise, that all these attempts proved abortive, by the conditions which were required by each nation from the other not being performed. These statutes, ineffectual as they have been, are, however, lasting monuments of the common law of both countries; and while they have not themselves answered the effect for which they were intended, they declare to us, in the strongest manner, that the common law affords no remedy for the evil at which they were pointed.

Of consequence it may, on the authority of these statutes, be said, that a person who flies into this country is intitled to live quietly and peaceably under the protection of its laws, as long as he does not offend against them; and that he cannot be sent back to the place from whence he came, on the pretext that he committed a crime there before he came here. The authority of these statutes receives additional force from the act 1701, which says, that no person shall be sent out of this kingdom, without his own consent, unless by sentence.

Upon the whole, it is humbly apprehended, that the court hath no jurisdiction to proceed to the trial of the pannel for the crime set forth in his indictment; nor can a decision of the court finding so be dreaded, on account of the consequences it may produce to the public. Though the law of both countries hath stood as it does at present from the earliest period of record; yet the experience of ages does not furnish us with many instances of crimes similar to that set forth in the indictment, committed from the hopes of impunity, derived from those laws. That the police of Great Britain should be rendered

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rendered as perfect as possible, is, doubtless, desirable; and that even the hopes of impunity for crimes should be taken from delinquents, is to be wished for. But your Lordships must interpret the law as it stands. If it is defective in regulations of police, or if it leaves hopes of impunity to delinquents, courts of justice cannot interpose to supply the defect; though the experience of those defects, which is gained by a thorough search into the law, in the course of trials on them, may weigh with the legislature to adopt new laws and new regulations; and to the legislature it only belongs to remedy those imperfections that are now felt by the inhabitants of Great Britain in the laws of England and Scotland, which owed their original to a time when the two countries, though united by situation, were divided in their government, their policy, their laws, and their affections towards each other."

The court, March 9. 1767, pronounced the following interlocutor. "They repel the declinature offered to the jurisdiction of the court, and find the said indictment relevant to infer the pains of law; and remit the pannel, with the indictment so found relevant, to the knowledge of an assize."—Upon this he petitioned, and was banished to the plantations for life.

Att. Pat. Murray, et alii.

Att. Croftie.

N^o 77.

March 16. 1767.

JOHN GRAY, procurator-fiscal of the sheriff-court of Haddington,

A G A I N S T

D U N C A N K E N N E D Y.

The sheriff cannot banish to the plantations.

KENNEDY was indicted before the sheriff-depute of Haddingtonshire for theft, and found guilty by a jury; upon which the sheriff adjudged him to be banished to the plantations, not to return

turn during the space of seven years; and ordained him to be detained in the prison of Haddington, until an opportunity offered for transporting him; with certification, that if ever he should be found in Scotland during the said space of seven years after his being delivered over for transportation, he should be publicly whipped through the streets of Haddington.

Kennedy offered a bill of suspension of the sentence, upon this medium, That the sheriff had gone beyond his powers: for his jurisdiction being limited to a certain territory, he could not pronounce a sentence that was to take effect without that territory; and no certification could take place upon this sentence; because, though the offender should return to Scotland in contempt of the sentence, he could not be apprehended, unless found within the sheriff's own county; he quoted the determination in the case of George Young, who, in 1751, offered a suspension of a sentence of transportation pronounced against him by the sheriff-substitute of Aberdeenshire. The court pronounced an interlocutor, by which they suspended the sentence; but, *in regard of the verdict*, banished him themselves.

Kennedy quoted the first part of this judgement as a case in point for him: but he contended, the latter part of it was irregular; because, when the sentence of a sheriff is brought under review of the court by suspension, the court must either suspend the sentence *simpliciter*, or affirm it, but cannot transform an invalid sentence of a sheriff into a sentence of their own, or indeed pronounce any sentence at all upon the verdict of a jury which was not assembled in their presence, or inclosed by their authority.

Answered, It is highly expedient on many accounts that sheriffs should have the power of transporting criminals that may be tried before them. Transportation is an arbitrary punishment well known, and established in the criminal law of this country. It took its rise during the reign of Charles II. when the severity of the times prompted great numbers to rise in rebellion, all of whom it would have been cruel and impolitic to put to death, in terms of the rigorous

ous laws then in force. Hence Sir George Mackenzie, in his Vindication of Charles II.'s government, observes, "As to sending away people to the plantations, it is answered, That none were sent away but such as were taken at Bothwell-bridge, or in Argyle's rebellion; and the turning capital punishment into exile was an act of clemency, not of cruelty." It may be true, that this punishment was first invented by the privy council; but whatever was the nature of its origin, it has been adopted as a legal punishment, and indeed is acknowledged to be such by the act 1701, which does not confine the power of inflicting it to the justiciary, but talks of judges in general, without any limitation.

Since, then, transportation is a legal punishment, and in many cases proper, it follows, that sheriffs ought to have the power of inflicting it; for they have an universal criminal jurisdiction, and may punish with death. It would be very absurd, were the law to take a secondary punishment out of their hands, while it allowed the highest to remain with them.

The objection moved on the part of the suspender proves too much: for if it were founded, this court could not transport more than the sheriff; for even the sentence of this court cannot take effect in America, or on the Atlantic ocean. But further, if this court be of opinion, that a power of transportation is a necessary consequence of the jurisdiction with which sheriffs are invested, the aid of this court will be given for enforcing the sentence of the sheriff, though it had not an opportunity of examining that sentence; as there is, and ought to be, a *comitas* between separate jurisdictions: and accordingly, in Young's case, in 1751, the sentence pronounced by the sheriff was executed by this court. However, there seems really to be no necessity for the interposition of this court to enforce the sheriff's sentence of transportation since the late act of parliament concerning transportation: for if the sheriff is intitled to pronounce such sentence, he is, by that statute, likewise intitled to contract for the service of the offender; and the person who contracts with him may, without any

further warrant, carry the offender from the county-gaol, through any part of Great Britain, until he places him on ship-board.

As to the judgement in the case of Young, the respondent is willing the suspender should have all the benefit from it that can be reaped from a single decision; but if the court shall be of opinion, that their predecessors were in the wrong, a single judgement will not prevent them from pronouncing that interlocutor which they themselves think law and expediency require.

Replied, Perhaps it may be proper that sheriffs should have the powers in question, and it may be expedient, that a statute should pass to give it them; but as such power undoubtedly exceeds their jurisdiction as at present established, however defective and inconvenient the law may be, the court must keep to it. — The same crime would be punished differently by different courts in many instances. For example, an assault or battery, which would be punished before the sheriff with banishment from the county, a long imprisonment, or other severe chastisement, before a baron would only subject to a fine of 20 s. and confinement for three hours. In the same way, the torture was a method of investigation, which, while it took place in this country, could only be put in practice by the justiciary or privy council. Nor are instances wanting, of judges having a power to inflict a capital punishment, but not a secondary one. Thus, in the Roman law, the *præses provinciae* had the *jus gladii*, or power of life and death, l. 6. § 8. ff. *De off. præf.*; yet he is expressly discharged to inflict the inferior punishment of *deportatio*, l. 2. § 1. ff. *De pen.* The late British statute concerning transportation did not bestow the power of inflicting it upon judges that had it not before, but passed merely to render more effectual those sentences inflicting it which should be pronounced by a competent court. And the remedy introduced by it is incomplete, and will not support the prosecutor's argument: for if the person to whom a felon has been adjudged, allows him to return within the time appointed, when he comes to be retransported the statute is of no further use; and the judge, in a gain

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gain putting his sentence in execution, must trust entirely to the ordinary powers vested in him by law.

The power of transportation in this court stands upon the footing of long usage and practice. Besides, the act 1701 supposes that persons may be transported by *legal sentence*; which implies, that there is one court in Scotland that can transport: but no law or practice has given such power to sheriffs.

As to this court giving aid to such sentences by sheriffs, it is not easy to perceive upon what principle, or by what form, that can be done. A judge is by law vested with the power of deciding causes that are properly brought before him, and of putting his sentences in execution; but it is no part of his office to employ his powers in executing the sentences of others. The court of session does not issue horning on the decrees of inferior judges, excepting where special statute requires them to do so; and the strict form of procedure established in this court, renders any interposition from it more difficult and inextricable.

The court, March 16. 1767, after a hearing, and very learned informations, pronounced the following interlocutor. "Sustain the
"reason of suspension of the sentence of the sheriff founded on the
"sheriff's want of jurisdiction to pronounce such sentence; but, in
"respect of the verdict returned against the said Duncan Kennedy in
"the said trial, decern and adjudge the said Duncan Kennedy to be
"banished, and hereby banish him, forth of that part of Great Britain called *Scotland*," &c.

Adv. Henry Dundas.

Adv. Blair.

N. B. There is a deal of argument in the papers with regard to the Roman *deportatio in insulam*.

N^o 78.

November 1767.

JOHN MILL, merchant in Dundee, and John Jaffray, procurator-fiscal of the sheriff-court of Forfar,

A G A I N S T

JANET NICOL, housekeeper to Dr John Brown, residing in Pleasants near Dundee.

A verdict against two pannels having been subscribed by the chancellor and clerk, returned into court, read, and recorded, without any objection, and sentence pronounced against one of the pannels, it is not competent for the other to challenge it, upon this medium, That in fact the verdict was not agreed to by the majority of the jurors.

JANET NICOL, and Alexander Downs, servant to the said John Mill, were indicted before the sheriff of Forfar, at his and the procurator-fiscal's instance; he for embezzling considerable quantities of ale, barley, and other such articles, from his master's brewery, and giving, or sending them, in a private and theftuous manner, to her, who resided in the story or flat immediately above Mill's house; she for receiving these articles, knowing them to be clandestinely and theftuously taken away.

The sheriff-substitute having found the libel relevant to infer an arbitrary punishment, a proof was led; and the jury, April 23. 1767, returned a verdict, finding, by a majority of voices, " That the said
 " Alexander Downs did, at fundry times, while servant to John
 " Mill and Company, during the time libelled, in a theftuous and
 " clandestine manner, deliver ale, in leglins, (pails), buckets, and
 " tea-kettles, the property of the said John Mill and Company, out
 " of their brewhouse at Pleasants aforesaid, to John Thain and Anne
 " Bell, then servants to the said John Brown, to be delivered by the
 " said John Thain and Anne Bell to the said Janet Nicol; and that
 " the said Janet Nicol did receive from them the said ale, in vessels
 " aforesaid,

“aforefaid, knowing the fame to be clandestinely and theftuouſly
“taken away, as faid is; as alſo, by a majority of voices, find it
“proven, That the faid Alexander Downs did ſeveral times, during
“the foreſaid period, theftuouſly and clandestinely ſend to the faid
“Janet Nicol, out of the faid brewhouſe, ſmall quantities of barm,
“the property of the faid John Mill and Company; and that the
“fame were received by her, knowing it to be theftuouſly and clan-
“deſtinely taken away, in manner foreſaid; and unanimoſly find
“the other points of the faid criminal libel not proven.”

This verdict was read over in court in preſence of the jury, with-
out any one diſſenting from or objecting to it, and then it was re-
corded. The ſheriff delayed judgement till the 1ſt of May then
next.

Upon the 1ſt of May he ſentenced Downs to be pilloried, and ba-
niſhed the county; but delayed judgement againſt Nicol to the 12th
of June.

During this interval Janet Nicol preferred a petition to the ſhe-
riff, ſetting forth certain facts, which ſhe offered to prove, and pray-
ing the ſheriff to allow her a proof of them; and, upon proof be-
ing brought, to find the verdict void and null, and aſſoillzie her *ſim-
pliciter*.

The facts which ſhe offered to prove were thus ſtated in her petition.
“After the jury was incloſed, the firſt articles that came under con-
“ſideration were the barley, the caſks of ale, and the draff, upon all
“which the jury were unanimoſly of opinion the fame were not
“proven. Thereafter the jury proceeded to take into their confi-
“deration that part of the libel which charged tea-kettles, buckets,
“and leglins; and as they differed upon theſe, a vote was put,
“Whether the fame were proven, or not? That ſeven of the jury-
“men, including the chancellor, who voted firſt, voted them, pro-
“ven; and ſeven voted, that there was only one tea-kettle proven;
“and Patrick Hunter, merchant in Dundee, the other juryman,
“and who was the laſt that gave his opinion, voted, that none of
“theſe articles were proven, and that the pannels were not guilty :
“upon

“ upon this David Watt, one of the jurymen, insisted, that Mr
“ Hunter’s vote should be taken down to that side who were most
“ favourable to the pannel; but was answered by the clerk, that he
“ could not do it; and upon this the foreman of the jury, who had
“ voted first, gave a second or casting vote against the pannels, lay-
“ ing aside Mr Hunter’s vote altogether.”

The sheriff-substitute being of opinion, that he ought not to grant a proof for setting aside the verdict, as not containing the true sentiments of the jury, disregarded the petition, and pronounced sentence against Janet Nicol; by which he fined her in L. 10 Sterling to the fiscal, and decreed her to pay L. 30 Sterling to the private prosecutor, in full of damages and expences; ordaining her, at the same time, to be imprisoned for thirty-six hours, and until she made payment of these sums.

Against this judgement Janet Nicol appealed to the circuit-court to be holden at Perth; and so did the private prosecutor, who thought the sums awarded by the sheriff to him too small.

Janet Nicol was afterwards advised to take another method of review, by presenting a bill of suspension to the court of justiciary: and upon advising the bill, with answers and replies, the court, August 3. 1767, found, That by presenting the bill of suspension, she had virtually passed from her appeal; and ordained parties to lodge informations with the clerk betwixt and the 12th of November.

The prosecutor, in his information, averred, the suspender’s allegations were false in almost every particular; and that fourteen of the jurors gave it as their opinion, that the article of the libel which charged the embezzlement of ale in tea-kettles was fully proved.

In point of law, the prosecutor argued, in the *first* place, That the sheriff had done right, in over-ruling the plea moved in arrest of judgement. If nullities and defects appear *ex facie* of the verdict returned, *e. g.* if it be not signed by the chancellor or clerk, a pannel may plead that nullity or defect in arrest of judgement; and the judge may, and ought to sustain it, and dismiss the pannel from the bar:

bar: but an objection which does not appear *ex facie* of the verdict, cannot be admitted. In the present case, the objection, instead of appearing *ex facie* of the verdict, is directly contradicted by it.—If the execution of criminal sentences was to be stopped until inquiries of this kind are made, every criminal would alledge, that the verdict did not give a true state of the *res gesta*.

In the case of Macgregor in 1752, [See N^o 60.], the court would not allow the jury to explain the meaning of their verdict: still less ought a jury to be allowed to overturn their verdict as false. The only mean of proof that can be resorted to by the suspender, is the oaths of the jurors; but as, upon the suspender's being remitted to them, they were sworn in the usual manner, and under the oath which they then took, allowed the verdict in question to be signed by their chancellor and clerk, in their names, and to be returned into court, read, and recorded, as a true verdict given by them, it would be most improper and incongruous, to allow them to be adduced as witnesses, to swear that it was not a true verdict. — The law has shewn a jealousy of jurymen: it has taken great pains to prevent solicitations before a verdict is returned; and the same distrust must prevent them from being called as witnesses to destroy it. The prosecutor does not suspect that any of the jury would go an improper length to serve the suspender in this case, however forward some of them may have been in giving declarations to aid her plea; but all consideration of character must be laid aside in this question.

The verdict, therefore, cannot be set aside: and, at any rate, supposing there was a possibility of overturning it, that cannot be done in a summary manner by suspension. It must be held *vere dictum*, until set aside in a proper process of reduction, either before this court or the court of session; which last has an undoubted jurisdiction to improve every false deed. Perhaps it may be true, that few instances have occurred, of actions for setting verdicts aside in that way; but it cannot possibly be believed, that the reduction of a verdict in criminal cases is an action unknown in law, as the suspender has alledged.

Lastly,

Lastly, Supposing all the suspender has alledged were proved, it would not avail; because she must still admit, that as much has been found proved as is sufficient to justify the sentence against her.

According to the suspender's own showing in her petition, no less than fourteen of the jury, including the chancellor, voted, that the reset of one tea-kettle of ale was proved against her; and she makes no objection to another part of the verdict, by which the majority of the jury find it proved, that she had resetted small quantities of barm during the foresaid period.

The suspender, in her information, argued, That if the facts stand as she has represented, and in the present state of the question that must be supposed to be the case, the procedure of the jury, or rather of the chancellor and clerk, was most irregular and illegal. The prosecutor has not argued, that the chancellor of a jury is intitled to a double vote, or that the vote of a juror is to be disregarded, because he did not give it precisely in the terms of the vote stated by the chancellor. The only question, therefore, is, Whether it be competent for this court to inquire into the proceedings of the jury while inclosed?

Though the verdict of a jury cannot be challenged, as proceeding without sufficient evidence, or as contrary to the evidence; yet from this it by no means follows, that it is incumbent on the court to pronounce sentence in conformity to every verdict returned. Were this law, there could be no such thing as a plea in arrest of judgment. The law which declares verdicts to be final, supposes them to be complete and formal, containing truly the judgement of the majority; consequently the maxim does not strike against objections made, not to the judgement of the jury upon the evidence, but to the form of the verdict itself; for instance, That it was not properly signed; That it does not apply to the libel; That the jury separated before agreeing to their verdict; or, That some person has been allowed to speak with them when inclosed. In all which cases, the court has been in the use of listening to such objections, and allowing a proof of them.

If

If there be any such thing as a good objection to a verdict, it surely must be this, That the paper produced in court as the verdict was not agreed to by a majority of the jury. A written verdict receives its force, not from its being signed by the chancellor, or returned into court, but from its containing truly and fairly the judgement of at least a majority of the jury. If a written verdict were irrefragable evidence of the judgement of the jury, contrary to the real fact, it might often happen, that a punishment, perhaps the severest, would be inflicted upon a person who had in truth been acquitted by his country. To prevent this, there must be a remedy in the law of this and every other civilized nation. The only possible method of redress is, for the court before whom the verdict is returned, to allow an objection to be pleaded in arrest of judgement, take proof of it, and disregard the verdict, if the fact be made out.

A variety of precedents cannot be expected in such a case. It appears, however, from Mackenzie, in his *Criminals*, that verdicts have been several times reviewed. One in a case of usury, he says, was set aside, because of an *error calculi*, *b. 2. tit. 8. § 5.*; and from *b. 2. tit. 6. § 6.* it appears, that the privy council frequently reviewed the proceedings of juries, and sometimes set aside verdicts, upon the merits of the proof; which last was plainly an incroachment upon the rights of juries.

In the practice of the law of England, where trials are more frequent, the very question now under consideration has occurred, and been determined. In Bacon's *Abridgement*, *voce Trial*, under the article of granting a new trial for any fault, mistake, or neglect in the jury who tried the cause, there is mentioned the following case. "A new trial was granted upon affidavits of eleven of the jurors, setting forth, That they had agreed to find a verdict for the plaintiff, and to give him five shillings damages; but that the foreman had, by mistake, given in a verdict for the defendant." This judgement, it is true, was in a civil case, where the verdict may be set aside, or a new trial obtained, merely because the verdict was contrary to evidence; but even in criminal trials, where the maxim

of the verdict's being final, is established in England in the same manner as in Scotland, the writers upon their law lay down a doctrine precisely agreeable to what is pleaded for the suspender. They observe, "That jurors may be considered either in a ministerial capacity, as persons bound to attend the court, to do the business for which they are returned till they are discharged; or in a judicial capacity, as judges of the fact to be tried." In this latter capacity, their opinion with regard to the fact cannot be challenged; but their proceedings in the former may; and one of the cases in which a challenge lies, is where a petty jury offer a verdict to the court, as agreed by their whole number, when, in truth, some of them have not agreed to it. *Bacon's Abridgement, (Juries), M.*

The prosecutors distinction, between objections appearing *ex facie* of the verdict, and those that do not so appear, has no foundation in law or practice. The objection, That some of the jury had gone out before the verdict was agreed to, and others of that nature, do not appear *ex facie* of the verdict; yet they are nevertheless unquestionably relevant. Neither is it of any consequence, that the objection in this case is contradictory to the verdict. The prosecutors argument here proves too much; for according to its doctrine, though a majority of the jury, or the whole, had, when the verdict was read in court, declared, that it was not their verdict, yet that must have gone for nothing: which would make the lives and fortunes of the subjects depend, not upon the jury, to whom the law has intrusted them, but upon the chancellor and clerk. The objection in reality is not contradictory to the verdict; for a writing signed by the chancellor and clerk cannot be called the verdict of a jury, unless it has been agreed to by the majority. The objection is not levelled against the verdict; but it is maintained, that the writing produced by the chancellor was not really the verdict: and the argument for the prosecutor comes to this, That the subscription of the chancellor and clerk is to be held *probatio probata* of the agreement of the jury; in contradiction, perhaps, to the unanimous voice of all the jurors: A proposition which cannot be admitted, without unhinging at once the

the security by jury-trial, and throwing into the hands of two men what the law has committed to fifteen.

The only difficulty in this case proceeds from the silence of the jurors when their verdict was read and recorded. But the fact is, the jurors were entirely unacquainted with legal procedure. None of them had ever been upon a jury before, excepting the clerk, who was a writer, and in his judgement they reposed entire confidence. When the verdict was returned, they could not properly disown it; because, from the information of their clerk, they believed their chancellor was intitled to a double vote; and that a juror's voice might be disregarded, because it was not given precisely in the terms stated by the chancellor: of course, they *bona fide* understood, that the verdict produced by the chancellor was really the verdict of the majority. Their silence imports this, and no more; so that it is not inconsistent with the supposition that the fact stands precisely as stated by the suspender.

The case of Macgregor is nothing to the purpose. In that case, the jury did not deny, that the verdict returned was the verdict in which they had all agreed; nor was there any doubt as to the meaning of the verdict. The only question was, as to the legal consequence of it, i. e. what punishment should be inflicted. With this the jury had no concern; and therefore the court very properly disregarded their declaration.

The prosecutor pretends to be afraid, that dangerous consequences would ensue if this objection were to be listened to. — But this is affected. It would be strange, if the law, which has put such confidence in juries, should refuse to examine them as witnesses upon a fact. Arguments of this kind ought to have hindered the court from listening to any objection that depended upon evidence. Had the chancellor marked in what manner each juror voted, as directed by the Regulations 1672, that alone would have been sufficient evidence of the fact.

The suspender has taken the most proper, and indeed the only method of obtaining redress. Had the trial been before this court,

the objection, if at all cognisable, would have been judged without a reduction. Unless every criminal court has a power of determining instantly questions that arise from the procedure of a jury, the matter would be inextricable: a reduction would not stop execution; so that it is plain the prosecutor, under this branch of his argument, supposes, that the law allows redress against wrongs in the proceedings of juries, and yet that there is no effectual method of redress. The reduction of a verdict in a criminal trial is not competent before the court of session, which is a civil court. It indeed once set aside a verdict upon an *error calculi*, which was alledged to be a medium purely civil. Mackenzie mentions the decision as an extraordinary one; and it was pronounced at a time when the Lords of Session were in use to pass bills for criminal letters, advocations of criminal matters, and suspensions of sentences of inferior criminal judges.— In Mackenzie's days, the most common way of obtaining redress against verdicts, even after sentence, was by an application to the privy council, which used great freedom with them.

As to a reduction before this court, it is incompetent, and no instance of such action is to be found in the records; so that if the objection is at all cognisable, it must be in the way of suspension. In civil cases, a suspension may often very properly be refused, reserving to the party to insist in a reduction. But in criminal cases there is no place for such distinction. In these, if the sentence is to be at all reviewed, execution must be stopped: for after execution, redress can seldom, if ever, be given to the pannel.

As to the prosecutor's argument, That though all the suspender alledged were proved, yet still there is enough in the verdict to support the sentence; the suspender's objection is, That the verdict is void. What would have been the precise tenor of the verdict had the procedure been regular, it is impossible to say. The sentence cannot be supported upon a hypothetical verdict which never was returned. It was never before insisted, that a verdict should be taken to pieces, and one part rejected and one retained. The suspender maintains, That the whole verdict must stand or fall together: if there be an

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error in any one part of it, or in any part of the procedure, the whole is vitiated. This obtained anciently, even in verdicts in civil cases; *Balfour*, voce *Brieves*. Even though the verdict was to be regarded *quoad* the tea-kettle of ale, and small quantities of barm, it would not afford a foundation for the sentence, by which the suspender is found liable in no less than L. 30 Sterling; especially as a great number of articles are brought into the charge which were entirely groundless.

The court pronounced the following judgement, Dec. 14. 1767.
“ Find, That in this case they cannot let the suspender into the evidence offered by her for disproving the verdict; but in respect of the circumstances of the suspender, pass the bill as to L. 8 of the fine, and as to one half of the sum awarded by the sheriff’s sentence, in name of damages and expences; and refuse the bill as to the remaining points of the sentence.”

Att. Wight.

Att. Blair.

This case is attended with a good deal of difficulty. The prosecutor admits, that relief ought to be had in some shape or other against such a verdict as that in question was alledged to be. It is clear the court of session would not, and could not, meddle with it. If the challenge be at all competent, it must be brought before the justiciary, and by suspension; for reductions are not known in the practice of that court, nor is there any reason for introducing them. Inconveniencies might follow, perhaps, from listening to a challenge of this kind, but the argument from such danger seems to prove too much.

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Robert Geddie junior merchant in Cupar in Fife, and ROBERT MACINTOSH, Esq; Advocate, with concurrence of his Majesty's Advocate,

A G A I N S T

GEORGE DEMPSTER, Esq; of Dunnichen, Advocate.

Privilege of parliament.—Judgement of the Justiciary reversed in an indirect manner by the House of Peers.—Bribery.—Libel for it upon the common law relevant; but dismissed, because it did not specify the time and place, and the prosecutor had not a sufficient title.

THE charge in the criminal letters was, "That whereas, by the laws of this realm, every act of bribery and corruption, and particularly, by the laws and constitution of this realm, all corrupt and illegal practices in the election of members to serve in parliament, or to influence, procure, or bring about the same, or in any other election whereby the election of a member to parliament may be influenced, procured, or brought about, in a corrupt manner, and by means of bribery and corruption, or the corrupting, or attempting to corrupt, directly or indirectly, by any gift or reward, or by any promise, agreement, or security, for any gift or reward, or by any offer of money, either in specie, or in bank-notes or bills, or of any other good deeds, any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes, in any election of a member to serve in parliament for any borough, or district of boroughs, or in any election of a delegate or commissioner from any borough, to chuse a member of parliament for the district to which it belongs, or in the election of public officers and ministers of the law, magistrates and rulers, who are intrusted with the administration of justice, and vested with power, authority, jurisdiction, and government, over their fellow-subjects, especially magistrates

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magistrates and counsellors of any royal borough; which magistrates and counsellors, beside their other legal powers, authority, and jurisdiction, by law are intitled to vote in the election of the delegate or commissioner for the borough, for chusing the member to parliament who represents the borough, are crimes of a heinous nature, and severely punishable; the more especially, when such acts of bribery and corruption, or attempts to bribe and corrupt, are practised and committed by a member of parliament, whose duty it is, in a particular manner, to discourage and discountenance all such illegal practices: Yet true it is, and of verity, that the said George Dempster, Esq; of Dunnichen, shaking of all regard to the laws of his country, and the well-being of the constitution, which, as a member of the legislature, it was a particular duty in him to defend and protect to the utmost of his power, is guilty, actor, art and part, of all or either of the foresaid crimes: In so far as the said George Dempster, Esq; and the complainer Robert Macintosh, having openly and publicly declared themselves as candidates, to represent the district of boroughs, of which the borough of Cupar in Fife is one, in the next parliament of Great Britain, which falls to be chosen as above mentioned in the course of the year betwixt Michaelmas last and Michaelmas next; and having each of them severally applied in a public manner to the several boroughs of the said district, soliciting the votes and interest of the members of the several town-councils thereof, who are the electors of the delegates for chusing the members to parliament, in order thereby, and by means of such votes and interest, to be elected and returned as the member to parliament for the said district of boroughs, in the said next parliament, to be chosen at the next general elections, he the said George Dempster, after declaring himself a candidate to represent the afore said district of boroughs, of which the borough of Cupar in Fife is one, in the next parliament of Great Britain, as afore said; and finding, that, without having recourse to bribery and corruption, he would not be able to procure the voice of the said borough of Cupar in Fife, or to introduce into the magistracy and council

council of that borough, at the annual Michaelmas election, such a set of magistrates and counsellors for the present year, as would secure to him a majority of votes in the election of the commissioner or delegate to be chosen by the said borough, for the purpose of meeting with the delegates or commissioners of the other boroughs of which the said district is composed, in order to elect and name a member to represent the said district in the said next parliament of Great Britain, he resolved to have recourse to those unconstitutional means, and did, by himself, or by others employed by him, corrupt, or attempt to corrupt, by gifts or rewards, or by promises, agreements, or securities, for gifts or rewards, a number of the members of the town-council of the said borough of Cupar in Fife, elected at the annual Michaelmas election in the year of our Lord 1766, who were the electors, or had a voice in the nomination and election of the counsellors and magistrates for the present year, from Michaelmas 1767 to Michaelmas 1768, and of the deacons of trades in the said borough, elected at the last annual election, who thereby came to have a voice in the election of the magistrates for the present year, to elect or appoint particular persons into the offices of magistrates and counsellors of the said borough of Cupar in Fife, for the present year, or to elect or appoint into the said offices such persons as he desired, or were, or as he thought were, devoted to his interest, or would serve his views; and not to name or appoint particular persons, because they were not, or he thought they were not, devoted to his interest, and would not serve his views; and also, by the like unconstitutional means, corrupted, or attempted to corrupt, several of the persons who he imagined would be named counsellors for the present year, to give their votes for the same set of magistrates; and likewise, by the same gifts, or rewards, or promises, agreements, or securities, for gifts or rewards, did corrupt, or endeavour to corrupt, numbers of the members of the council for the present year, to give him their interest in the choice of the commissioner or delegate to be appointed by the said borough of Cupar in Fife, for the electing a member of parliament for the said district,

in

in any election that might occur during their continuance in council: And more particularly, the said George Dempster, upon the 29th or 30th days of September last, or upon one or other of the days of that month, or of the month of August preceding, or October following, did, by himself, or by other persons employed by him, by gifts or rewards, or by promises, agreements, or securities, for gifts or rewards, corrupt, or attempt to corrupt, or by corruption procure, or attempt to procure, the following persons, viz. David Ritchie land-labourer, and then one of the counsellors of the said borough of Cupar in Fife, having a right to name his successor at the said last annual election of magistrates and counsellors for the said borough, on the 7th of October last, and now a member, or pretending to be a member, of the town-council of the said borough, as an adjoined counsellor for this year; James Tod surgeon in Cupar, then a counsellor, having the like right to name his successor, and now a counsellor, or pretending to be such, by virtue of his being a bailie, or pretended bailie; Thomas Greig, then a counsellor of the said borough of Cupar, and having the like right of nomination, and now a counsellor, or pretending to be a counsellor, in virtue of his pretended election into the office of bailie; Alexander Millar barber and wigmaker in Cupar, then a counsellor of the said borough, having the like right of nomination of his successor, and now a counsellor, or pretending to be such, by virtue of a pretended election into the office of treasurer; Primrose Rymer, now a counsellor, or pretending to be a counsellor, of the said borough of Cupar, by virtue of the nomination, or pretended nomination, made by Christianus Adamson, one of the old counsellors, at the said late election on the 7th of October last; James Sibbald, then and now deacon of the shoemakers, and convener of the trades of the said borough of Cupar in Fife, and as such a member of the council; and David Duncan, then and now deacon of the bakers, and as such a member of the council, or one or other of them, or one or other of the other persons then or now members of the council of the said borough, to give their votes at the annual election of magistrates

strates and counsellors of the said borough of Cupar in Fife for the present year, upon the said 7th day of October last, for such persons as he the said George Dempster, and his party, inclined to bring into the council, and office of magistrates; and not to give their votes for, or nomination of, particular persons to be counsellors or magistrates, thereby to keep them out of the said offices; and also did, by the like gifts or rewards, promises, agreements, or securities, for gifts and rewards, corrupt, or attempt to corrupt, or by corruption procure, or endeavour to procure, the foresaid persons, or several of them, or other members of the town-council of the said borough of Cupar in Fife, or some one or other of them, to give, or to promise to give, their votes, in the choice of the commissioner or delegate, to some person in the interest of him the said George Dempster, or who should serve him in the election of the member to parliament, or elect him the said George Dempster to be the member: And further, he the said George Dempster, upon Saturday the 3d of October last, or upon one or other of the days of that month, did send several times for, and actually meet with, James Morres, present deacon of the waulkers in the said borough of Cupar in Fife, and of consequence a constituent member of the town-council of the said borough till the next annual election of deacons in the year 1768, having a right to vote in the then ensuing election of the magistrates for the present year, and in the election of a delegate or commissioner from the said borough, for chusing a member of parliament for the foresaid district in any election that may occur betwixt and Michaelmas next 1768, in the house of the foresaid James Sibbald, convener of the trades of the said borough of Cupar in Fife, who was employed by the said George Dempster, or by some other person by his desire, to go for, and bring the said James Morres to meet with him the said George Dempster; and at the said meeting or interview between the said George Dempster and the said James Morres, in the house of the said James Sibbald, he the said George Dempster did strongly solicit the said Deacon James Morres to give him his interest in the said elections of magistrates and

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and delegate; and in order to enforce and make effectual these solicitations, did repeatedly offer to, and press the said James Morres to take money, and to give him his promise; and at last did put three different parcels into one of the waistcoat-pockets of the said Deacon James Morres, each of which parcels contained twenty notes for one pound Sterling each, of what is commonly called the *Dundee bank*, issued in the name of, and signed by Robert Jobson, cashier to George Dempster, Esq; and company bankers in Dundee; which three parcels of bank-notes will be lodged in due time with the clerk of our court of justiciary, that the said George Dempster may see the same. And further, the said George Dempster did, upon Monday the 5th day of October last, or on one or other of the days of that month, or of the month of September preceding, in the house of Provost John Baxter, in the said borough of Cupar in Fife, or at or near to the laigh back-door of said house, towards the garden, strongly solicit James Thomson, then and now deacon of the fleshers in the said borough, and of consequence a member of the town-council of the said borough for the present year, and having a vote in the then ensuing election of the magistrates of the borough to be chosen upon the 7th day of the said month of October, and also having a vote in the election of the delegate for chusing a member of parliament to serve for the said district, in any election that might occur betwixt and Michaelmas next, to join the interest of him the said George Dempster, and to stand by that leet which should be given in by the said Provost John Baxter at the said ensuing election of the magistrates: and after mentioning that a trading man was always wanting money, promised, that if he the said James Thomson would say the word, he would believe it, and would give him any thing he would ask or demand. And further, he the said George Dempster did, upon the 3d day of October last, being the Saturday previous to the annual election of magistrates in the said borough of Cupar in Fife for the present year, or on one or other of the days of that month, or of the preceding month of September, come to the house of John Smith tanner in Cupar in Fife; and after

some conversation with the said John Smith, who he had reason to believe would be chosen or nominated a counsellor for the present year, as he actually was at the said last annual election, he endeavoured to prevail with the said John Smith to join his interest in the aforesaid elections of magistrates and delegate; and in order to enforce his solicitations, took out of his pocket four parcels of bank-notes, containing, as he the said George Dempster said, L. 80 Sterling, and offered the same to the said John Smith; saying, at the same time, that it would relieve him, and pay his debts when he pleased. And further, the said George Dempster did, upon Friday the 2d day of October last, or upon one or other of the days of that month, or of the preceding month of September, come to the house of James Campbell, innkeeper in the said borough of Cupar in Fife, who was one of the counsellors of the said borough from Michaelmas 1766 to Michaelmas last, and of consequence had a voice in the nomination and election of the new counsellors and magistrates of the borough for the present year; and after asking the said James Campbell, if he was engaged with regard to the elections, told him, that if he would go in with, or stand by, the said Provost John Baxter's leet, he would immediately give him L. 50 Sterling. And further, the said George Dempster did, upon Friday the 2d of October last, or upon one or other of the days of that month, or of the preceding month of September, come, two several times, to the house of David Preston, changekeeper in the said borough of Cupar in Fife, then a constituent member of the town-council of the said borough, and who, the said George Dempster had reason to expect, would be a member of the said council for this current year, as in fact he would have been, had he not been prevented or disappointed of being named into that office at the last Michaelmas election, by means of bribery and corrupt influence, used and practised by the said George Dempster, and others his associates, or employed by him to bribe and corrupt, in order to keep the said David Preston out of the council for this year, because he the said David Preston would not be corrupted by the said George Dempster, to serve his views
and

and purposes, as after mentioned; and at the said two several times, when he the said George Dempster came to the house of the said David Preston, he did then and there earnestly intreat the said David Preston to be for the foresaid Provost John Baxter's leet of magistrates, and to give his interest to the said George Dempster himself, as a candidate for representing the borough in parliament; and after asking the said David Preston, upon one or other of the said occasions, whether he owed any money? and the said David Preston answering, That he was a silly body, that neither owed, nor had owing to him, the said George Dempster corrupted, or attempted to corrupt him the said David Preston, for the ends and purposes aforesaid, by an offer of L. 50 Sterling. At least the said George Dempster, above complained upon, is guilty, actor, art and part, of the crimes of bribery and corruption before mentioned, or of attempts to bribe and corrupt, and of the illegal and corrupt practices before mentioned, for the ends and purposes aforesaid. All which facts", &c.

When the day of Mr Dempster's appearance drew nigh, a consultation of his lawyers was held; and they were unanimously of opinion, that he should plead privilege of parliament. Accordingly a written petition was preferred to the court of justiciary, 26th November 1767, stating that plea. This petition the court ordered to be served upon the prosecutors or their procurators, and that they should put in answers within forty-eight hours after service. It is needless to transcribe the petition here, as the most material part of it was recited verbatim in the following printed answers.

"The petition sets forth, "That the petitioner has been cited to
"stand trial before your Lordships, in virtue of criminal letters raised at the instance of the respondents, accusing him of the crimes
"of bribery and corruption, or of attempts to bribe and corrupt,
"and the other illegal and corrupt practices therein particularly
"mentioned.

"That the citation upon these letters commands and charges the
"petitioner to compear, and find sufficient caution acted in the
"books

“ books of adjournal, that he will appear before your Lordships up-
“ on the 7th day of December next, to underly the law, for the
“ crimes mentioned in the said criminal letters, under the pain of
“ rebellion, and putting to the horn, if such caution and surety,
“ acted in manner foresaid, is not found within six days after the
“ said citation, which bears date the 21st of this month of Novem-
“ ber.

“ That it is unnecessary to inform, because well known to your
“ Lordships, that the parliament of this kingdom is called, and
“ now actually met, for the dispatch of business, and of course,
“ it is the duty of the petitioner to give his attendance in that
“ house of parliament of which he has the honour to be a mem-
“ ber.

“ That the petitioner considers any violation of the freedom of
“ the person of a member of parliament, to be a gross and daring
“ attack against the fundamental and vital privileges of the house;
“ and although prosecutions, perhaps, for criminal offences of cer-
“ tain kinds, may be brought against members of parliament, yet
“ it is essential to the very existence of parliament, that every mem-
“ ber be at liberty to attend his duty, and that no restraint be laid
“ on his person, unless the safety of the state, or of individuals, ne-
“ cessarily require it.

“ That there was any such urgent necessity on the present occa-
“ sion, cannot be alledged; and therefore the petitioner, although
“ it were his choice, is not at liberty to wave his privilege as a
“ member of parliament, by granting bail in the circumstances of
“ this case, or coming under any obligations of that kind, incon-
“ sistent with the sacred privileges which the wisdom of this consti-
“ tution has devised for securing the freedom and independency of
“ parliament.

“ That it is from this consideration only, and from no unwil-
“ lingness to stand forth in his defence, against this calumnious
“ and vexatious prosecution, brought in consequence of political
“ spleen and disappointment, that the petitioner finds himself under
“ the

“ the necessity of laying this matter before your Lordships, as he
“ knows you would not chuse, that criminal letters, raised under
“ the signet of this court, should be used in such a manner, as to
“ infringe upon the privileges which the law and constitution of this
“ country has stamped upon the person of a member of parliament,
“ as essentially necessary for preserving the freedom and independ-
“ ence of parliament.”

The petitioner therefore prays “ your Lordships to take the pre-
“ mises under your serious consideration, and to sist all further pro-
“ ceedings whatever upon the criminal letters raised at the instance
“ of the respondents against the petitioner, during the session of par-
“ liament, that he may not be further molested, or hindered in
“ the attendance of his duty in parliament; and that the privi-
“ leges of that Most Honourable House whereof he is a member,
“ may not be violated or infringed in the person of the petitioner.”

Upon this petition, your Lordships have been pleased to pro-
nounce the following order: “ *Edinburgh, 26th November 1767.*
“ The Lords Justice-Clerk and Commissioners of Justiciary, having
“ considered the foregoing petition, they appoint the same to be
“ intimated to Robert Geddie, and Mr Robert Macintosh, the two
“ complainers mentioned in the foregoing petition, or either of
“ them, or to their known counsel or agent, by delivering an exact
“ copy of the said petition, and this deliverance thereon, to the
“ said parties, counsel, or agent; and ordain them to put in their
“ answers thereto within forty-eight hours after such service, with
“ certification.”

In consequence of this order, the petition has been served upon
the respondents counsel and agent, without any notice being taken
of his Majesty's Advocate, who, by his concurrence, prosecutes for
his Majesty's interest. The purpose of the service ordered by the
court seems to be, that the respondents should show cause why
the trial of the petitioner should not be stayed, that he may, as he
terms it, not be further *molested, or hindered in the attendance of his*
duty

duty in parliament; and the following answers to the petition are humbly offered.

In the *first* place, The respondents most heartily make a present to the petitioner, of all the benefit he can have from the epithets of *vexatious and calumnious*, which he bestows upon the prosecution, without once denying the charge, or asserting his own innocence. The petitioner's attempt, by any subterfuge whatever, to evade a trial by his country, according to the laws of the land, is but a bad proof that the charge is calumnious. A fair trial will always be the first wish of an innocent person, aggrieved with a false accusation. The privilege of parliament, respectable as the name is, is but a subterfuge. It is a great abuse, if not a prostitution of it, to attempt to make it a cover from a trial for a high crime, which, in itself, is the highest breach, not only of the privilege of the House of Commons, but of the rights and privileges of all the commons of Great Britain. It would be an injury to innocence, to stop a trial by which it could be cleared. To guilt only is it natural to prevent or procrastinate the means of a legal justification.

2dly, Though the privilege of parliament seems to be the foundation, and the maintenance of it is set up as the end, of the petition, the respondents do not observe, that the petitioner has pleaded his privilege: he does not indeed wave it; and he says, he is not at liberty to wave it, although it were his choice. There is not in the law of Scotland a writ of privilege as there is in England; but there may be here, as well as there, a plea of privilege; and the petitioner might plead his privilege at the proper time, as a temporary bar to the prosecution, if he is advised that it is a good plea. How far your Lordships are bound to take notice of the privilege of parliament, it is for yourselves to determine. The respondents not only do admit, that the petitioner is a member of the House of Commons, but have, in the criminal letters, expressly accused him under that character and description, charging it as a high aggravation of his offence. If the court is bound to take notice of the privilege of parliament, they would doubtless give effect to it, though not pleaded, in

in any case to which it did apply, and where the fact is admitted, or appears from the record. The respondents do not indeed know, that it is *pars judicis* to take notice of privilege, unless it is pleaded. The usage certainly is to plead it, and the plea does not yet appear to be made in this petition.

3dly, The petitioner has bethought himself rather too late, when he now objects to the *granting of bail*, under the *circumstances of this case*, or to the coming under any obligations of that kind, inconsistent with what he calls the *sacred privileges*, by which he would protect himself from justice: for he has already found bail to stand trial at any time within six months, by a bond taken by the sheriff-depute of Fife, upon a criminal information, presented to him, charging the petitioner with the crime for which he is now prosecuted.

4thly, The petitioner may consider any violation of the freedom of the person of a member of parliament to be a gross and daring attack upon the fundamental and vital privileges of the House of Commons, and he may consider what he pleases to be such a violation: but the respondents know of no violation of the freedom of the person of a member of parliament but what is made in contempt of the law of the land, and of the law of parliament; the resolutions of which are the only law we have that defines the nature or extent of privilege. And they do humbly maintain, that the bringing the petitioner, though a member of parliament, to a legal trial for an offence against the laws of his country, is not a violation of the freedom of his person, because it is not against law, or against privilege, but agreeable to the rules of both, that criminal trials should proceed.

The respondents entertain all possible respect for the privilege of parliament: they owe all submission to the law of parliament; and, for their own sakes, if they had no better reason, they will pay all obedience to it. They revere the wisdom of the constitution, which has devised the privileges necessary for securing the freedom and independence of parliament; they hold them as sacred as the petitioner can do; and will neither do, nor desire any thing to be done, inconsistent with them. But they deny, that it is inconsistent with these privileges,

to bring a member of parliament to trial and to justice for a crime.

The high-sounding language of the petition above quoted, does not alarm the respondents: these are, as the celebrated poet says, *fine words*; though the respondents cannot add, as the poet does, *We wonder where you stole 'em.*—Whether the *borrowed* expressions were *fairly* obtained, or have been *properly* used to the purpose for which they are now applied, the petitioner may in time be made sensible.—The respondents already know full well.

The petitioner seems to be afraid of admitting any thing; and therefore he only says, with a *perhaps*, that *prosecutions for criminal offences, of certain kinds, may be brought against members of parliament.* But the respondents shall not desire the petitioner to point out this division of offences into kinds; they, without any peradventure, are bold to advance it as good law, and consistent with privilege, that a prosecution may be brought and proceed against a member of parliament for all crimes of any kind, even when parliament is sitting. And although it be true, as the petitioner says, that *it is essential to the existence of parliament, that every member be at liberty to attend his duty*, it is no less true, that the essential prerequisite is the member's preserving his liberty, by not transgressing his duty to his country.

Nor will it avail the petitioner to say, as he also does, that it is *essential to the existence of parliament, that no restraint be laid upon a member's person, unless the safety of the state, or of individuals, necessarily require it*; for both the safety of the state and of individuals necessarily require, that offenders against the laws of their country be brought to justice. *Interest reipublicæ*, that crimes do not remain unpunished; and individuals cannot be safe in the enjoyment of any right they have, if the laws, under the protection of which they live, and which are the birth-right of every subject, are not executed for the punishment, in order to the repression, of crimes. The attendance of a member of parliament, lying under a legal accusation of a high crime, which he does not so much as deny, and for which

which he refuses to take his trial, cannot be very profitable to the state: but as it must be very advantageous to himself, that he be soon made clean, so it must be highly useful to the public, that if he is guilty, he be, without delay, proved to be unworthy of so high a station, and so great a trust.

The general answer, therefore, to the grounds of this petition, is, That privilege of parliament does not at all extend to any criminal case whatever. This is an idea which must be native even to those who are not very conversant with the parliamentary doctrine, or debates upon privilege, as founded on the general principles of law, and the notions of common sense. A privilege to commit crimes with impunity is a strange privilege. A privilege to *disable* the law, and deprive the subjects of the security arising from the speedy trial and punishment of crimes, cannot be a *legal* privilege. Crimes endanger the state; and a protection against the punishment of them cannot be the privilege of parliament, which is the bulwark and defence of the state.

The respondents would perhaps do wrong, if they professed themselves able to enter into a discussion of the nature and extent of privilege of parliament, in all the involutions of its system. Parliament chuses to keep those matters in their own hands. It is generally said to be the language in parliament, that they will not suffer courts of law to judge of their privilege. The authorities upon which privilege can be discussed or debated, are not in the Municipal-law books, or usually within reach of those who practise in courts of law; and it should seem to be necessary for a privileged case to be well known and understood, before the common course of justice, and the law of the land, be impeded upon such a pretext. It must therefore lie upon him who makes the plea of privilege, to make his case out by proper authorities, for proving, that privilege extends to the matter in which the plea is offered.

It is universally known, that privilege of parliament extends to all civil actions, during the usual time of privilege, and under the limitations settled by particular statutes; the leading one of which

is the English statute of King William, explained and limited by the statute of the 11th of the late King; whereby civil suits are allowed to proceed, during any recess of parliament, for above fourteen days, though within the usual time of privilege. Here therefore the courts of law have a clear rule to go by.

But there is no statute allowing criminal prosecutions to be carried on, or prescribing any time for them. The reason is a very plain one, That crimes, and their consequences, have never been considered to be an object of the privilege of parliament, or that it had any thing to do with them.

Treason, felony, and the peace, have never been pretended to be cases to which the privilege of parliament extended. They are my Lord Coke's words; and, down from his time, they have been the text in all debates upon privilege; and the last word, *the peace*, is the only litigable branch of the exception. It has been construed, by both houses of parliament, to carry *the refusing to give surety of the peace*, and also to import *breach of the peace*. What is a breach of the peace, has been matter of dispute: but the ideas of the law have prevailed, agreeable to the opinion of the greatest lawyers, and the greatest parliament-men, that every crime is a breach of the peace, being *contra pacem Domini Regis*, which are the legal style of criminal charges in the law of England; and upon that principle the most keenly debated cases have been determined in regard to privilege.

The respondents will not presume to enter farther into a discussion of the doctrine of privilege, especially in answer to a petition which does not produce any one authority to prove, that privilege of parliament extends to the case in question, or offer any ground whatever for your Lordships listening to the surmise, (for it is no more than a surmise), that the petitioner ought not to be brought to trial for the crime with which he is charged.

If declamatory words, as to the *fundamental and vital privileges of the House of Commons*, are authorities, the petition is full of them; but other there is none in it. It is not attempted to bring these
general

general topics of declamation home to this case by any kind of application. There is not in the whole petition so much as an averment, that privilege of parliament does extend to this case, or that there is one resolution of the House of Commons, importing, that privilege of parliament is a stop to a criminal prosecution.

The petitioner's praying for such a stay, that (as he says) the *privileges of the Honourable House of Commons may not be violated or infringed in his person*, will surely never prove, that his being obliged to stand his trial, is a violation of the privilege of parliament, until he proves, that privilege of parliament extends to the case, or is a legal stay of proceedings in a criminal prosecution, which your Lordships are bound to apply.

The answer might rest here; but the respondents will challenge the petitioner to produce one instance, in the whole journals of the House of Commons, of a complaint of a breach of privilege for any proceedings in a criminal prosecution. They are well assured, there are none such to be found; and it is the strongest proof of the sense of parliament, and of the sense of the nation, that privilege does not extend to that case. It never was imagined, that privilege could screen a member of parliament from being brought to trial for a crime. The idea revolts the mind. It is destructive of society.

There have been many proceedings in the House of Commons, upon applications to the House, for members waving their privilege; but they are all as to civil actions: and indeed an application for a member to wave his privilege in a criminal prosecution, would be something like an application for him to submit to punishment without constraint; for if a person is innocent, he will be desirous to take his trial to justify himself; and if he is conscious of being guilty, he would probably be of the mind of a member, of whom history reports, that he made this short speech, after a long debate about his waving his privilege, "The privilege is mine, and I *will not* wave it." The truth is, the arm of the law is not so short, as to need

a waiver of privilege, or the consent of an offender, to bring crimes to punishment : *Non eget hoc arcu.*

The complaint in the case of Mr Wilkes was not of a breach of privilege in bringing a criminal prosecution, or in proceeding to trial, but for apprehending his person, by a warrant for the offence charged, before trial. So far appears upon the journals ; and as it is the happiness of this country, that we can be informed by our representatives of what passes in parliament, there is good ground, upon common fame, to say, that the great debate which arose in that case (exclusive of the exceptions taken to the legality of the warrant, upon the intrinsic circumstances of it, and the manner of its execution) turned upon this general point, Whether the crime charged against Mr Wilkes was not a constructive breach of the peace, falling within the third case excepted from privilege ? and that it was upon that principle that that case was ruled in the manner it was. The resolution in the case, in which both houses of parliament concurred, after solemn debate, as is universally known, stands upon the journals, and is the law of parliament. It was resolved, That *privilege did not extend to the case of a seditious libel* ; by which the apprehending of Mr Wilkes's person was held not to be a breach of privilege.

Upon the authority of that resolution, as well as of the doctrine which the respondents have very good reason to believe was the foundation of it, it must be clear, that the privilege of parliament does not extend to the case of bribery and corruption, the crime charged against the petitioner, there being no distinction between the two crimes in nature or circumstances, as concerning the point of privilege, which the line of law or reason can fathom. And if the apprehending of Mr Wilkes's person, before trial, for such an offence, was not a breach of privilege, much less can proceeding to a trial, for a crime much higher in quality, be inconsistent with privilege.

The respondents can further aver a fact of notoriety, which must consist with the petitioner's own knowledge, viz. that, very short
while

while before the debate in Mr Wilkes's case, one of the oldest and most respectable members of the House of Commons, a privy-counsellor, was tried in the court of King's Bench, at the very hour the House of Commons was sitting under the same roof, for the crime of perjury. So little was it dreamed, that privilege of parliament was a stay to a criminal prosecution, and so little idea had that worthy member of parliament of hindering a trial by which he could be acquitted with honour, as he was, from a truly vexatious and calumnious accusation.

The journals of the House of Commons, which the petitioner may be presumed to be acquainted with, afford another instance, which happened a good many years ago, of a member of parliament who was sentenced, while the parliament was sitting, to stand in the pillory. The case has sometimes been mentioned, because of an anecdote that attended it, by which the fame of it has spread. — The fact was, that the member received judgement in the court of king's-bench before the matter had been taken notice of in the House; and the eminent person who then presided with so much dignity and honour in that great assembly, being informed of it, and justly thinking, that it would make a strange figure to see a member of the House of Commons standing in the pillory at Westminster-hall gate when the House was assembling, means were fallen upon to delay the execution of the sentence, till the record of the conviction was laid before the House; upon which the criminal was expelled.

From these instances, which are of notoriety, and the last mentioned of them appearing upon the journals, joined with the silence already taken notice of in the journals, as to complaints of breach of privilege in the case of criminal prosecutions, your Lordships may judge of the matter of this petition.

The case of Mr Wilkes is the last adjudged case in parliament that has any relation to the present question, so far as the respondents have been informed; and the authority of it in point is submitted. The solemnity of it is well known. — It is a solemn resolution

lution after great debate, in which both houses of parliament concurred.

There did occur a case in the House of Lords before that time, which has made some noise, and may, like all other cases that are misunderstood or misrepresented, have misled some who have heard of it; the respondents therefore think it but just to the court to take notice of it.

It was the case of Lord Tankerville in 1758, against whom an information was filed for bribery, at the election of a member for Windsor, upon a vacancy occasioned by the promotion of an Honourable Gentleman, now a peer of parliament, to a high office. An attachment from the court of king's-bench was issued and executed upon Lord Tankerville, for not appearing to plead to the information. Upon a complaint to the House of Lords, for breach of privilege, their Lordships determined, that there had been a breach of privilege. But the circumstances of the case were, that the attachment, and the execution of it, was illegal, and irregular in point of form; and it never was disputed, but what is in itself illegal, is, in the case of a member of parliament, a breach of privilege. The filing the information was not considered to be a breach of privilege; nor would any proper process to compel to plead to it have been.

That very point, of the legality of issuing an attachment against a member of parliament, to compel him to plead to an information, did, as the respondents have been certainly informed, occur on occasion of the case of Mr Wilkes; and, probably, the petitioner knows, that the great lawyer, then first in the King's service, made no secret of it, how clear he was, that privilege of parliament was no bar to the issuing or executing of a *Capias* or attachment. He had *officially* ordered one to be taken out against Mr Wilkes before the resolution of parliament in his case; and it was only out of delicacy that he did not order it to be executed, because the general question was *sub judice* in the House; for he had not a spark of doubt on the point himself.

The

The case of Lord Tankerville, therefore, is of no authority to any question of this kind; and of that there is the most satisfactory evidence, from the determination in Mr Wilkes's case, with which it would have been absolutely inconsistent, but for the particular circumstances which distinguish the two cases, upon the illegality and informality of the proceedings in Lord Tankerville's case. At any rate, the last determination, which was in Mr Wilkes's case, would derogate from any former one, inconsistent with it; and that in the case of Mr Wilkes was certainly a very solemn one, the most so of all that ever were debated in parliament.

The respondents hope it will appear to your Lordships, that the petition has no foundation on which to support the prayer of it. The petitioner says, he is not at liberty to wave what he calls a *privilege*, but which the respondents conceive not to exist. On the other hand, the respondents cannot wave, nor do they believe can they dispense with, the common law of Scotland: neither do they imagine it is in the power of any court to repeal or abrogate it. Part of that common law most certainly is, to bring to trial an offender for a crime against it. The forms of trial in your Lordships court, are no less a part of that same common law; and the diets in all criminal trials are peremptory. The present question, therefore, is left with your Lordships. If the petitioner apprehends the respondents have been guilty of any breach of privilege in his person, they need not tell him where the proper judicature is for that complaint; and, not conscious of any transgression, they do not desire to shun the trial in its proper place."

The case was argued on the 4th and 7th December 1767.

Mr Lockhart for the prosecutor*.—If any breach of privilege has been committed, by bringing Mr Dempster to trial, yet the judges are safe. Should be sorry if this was not an indictable crime in

* The following note of the pleadings is very imperfect, save as to the last; so is that of the opinions.

England. It is clearly actionable before the criminal court here; and if the defender demand a stay of the prosecution, it lies upon him to show a good reason for that stay. The court has no power to delay justice. They may indeed put off a trial from considerations of necessity; when the pannel is indisposed, the witnesses carried off, or any other reason of that kind occurs; but not otherwise.

With regard to privilege, the pretence used by the defender, That there are only three exceptions, viz. treason, felony, and breach of the peace, takes its rise from Lord Coke's short way of writing. The doctrine would be attended with great injustice if listened to, as it would give all members of parliament, and their servants, a freedom from trial, not only during the sitting of parliament, but after its recess; that is, constantly, excepting during the short interval between the dissolution of one parliament and the meeting of another. It was thought necessary to limit privilege in civil causes, 12^o et 13^o King William: it would be very extraordinary, therefore, if this privilege should defend against criminal suits.

When questions concerning privilege come before parliament, it does not give a general judgement, but decides each particular case according to its circumstances. In Wilkes's case, the lawyers gave their opinion, That breach of the peace comprehended all crimes. Every crime must be charged *contra pacem Domini Regis*. And in England, there is no difference betwixt an indictment and information, excepting in the form. If privilege at all extend to this case, it will not be sufficient to delay till after the session of parliament; for privilege extends beyond that time. Case of Lord Tankerville does not apply. In fact, it was an irregular execution of an illegal warrant. Redress might have been had in another way; but privilege was the short-hand way.

Mr Macintosh. — Have had many advantages of understanding this question from local situation, and cannot have erred from ignorance. The defender, who is a member of parliament, cannot be excused, by pleading ignorance in this case.

When a plea of privilege is made, judges must pronounce upon it.

it. — Defender is possessed of authorities, showing, that even the parliament itself cannot stay a criminal prosecution. In Wilkes's case, the abstract proposition laid down in parliament was, That no crime whatsoever fell under privilege. There are at least five hundred crimes which do not come under the denomination either of *treason*, *felony*, or *breach of the peace*, strictly so called; and it would be absurd, if members of parliament might commit all these with impunity. Privilege of ambassadors never was extended to crimes. In civil cases, a man knows, or ought to know, the condition of the person with whom he contracts; but I cannot contract with a man not to commit crimes. The word *privilege* imports, that it is a matter of favour. Can there be any favour for crimes? In England, every crime is said to be committed *vi et armis*. Bribery is an indictable crime in England. See the authorities in the case of Dingwall election.

Mr Swinton, for the pannel, quoted several authorities and cases. The law of privilege, touching imprisonment of the persons of Lords of parliament, as stated by the two standing orders, declares generally, "That no Lord of parliament, sitting the parliament, or within the usual times of privilege of parliament, is to be *imprisoned or restrained*, without sentence or order of the House, unless it be for treason or felony, or for refusing to give security for the peace, and refusing to pay obedience to a writ of *Habeas corpus*."

The Lords, in the following reign, most solemnly ratified this doctrine, in the famous case of the Earl of Arundel, (1626), by a resolution *nemine contradicente*, and then presented to the King the following remonstrance. "May it please your Majesty, We, the Peers of this your realm, now assembled in parliament, finding the Earl of Arundel absent from his place, that sometimes in this parliament sat amongst us, his presence was therefore called for; but hereupon a message was delivered unto us from your Majesty by the Lord Keeper, That the Earl of Arundel was restrained for a misdemeanour, which was personal to your Majesty, and had no relation to matter of parliament. This message occasioned us

“to inquire into the acts of our ancestors, and what in like cases
 “they had done, that so we might not err in any dutiful respect to
 “your Majesty, and yet preserve our right and privilege of parlia-
 “ment; and after diligent search, both of all stories, statutes, and
 “records, that might inform us in this case, we find it to be an un-
 “doubted right, and constant privilege, that no Lord of parliament,
 “fitting in the parliament, or within the usual times of privilege of
 “parliament, is to be imprisoned or restrained, (without a sentence
 “or order of the House), unless it be for treason, or felony, or for
 “refusing to give security for the peace; and to satisfy ourselves the
 “better, we have heard all that could be said by your Majesty’s
 “learned counsel at law, that might any way infringe or weaken
 “this claim of the Peers; and to all that can be shewed or alledged,
 “so far satisfaction has been given us, that all the Peers in parlia-
 “ment, upon the question made of this privilege, have *una voce*
 “consented, that this is the undoubted right of the Peers, and has
 “inviolably been enjoyed by them.”

The Scotch statute 1701, c. 6. *in fine*, provides, “That no member
 of parliament attending shall be imprisoned or confined, upon any
 account whatsoever, during a session of parliament, without a
 warrant of parliament; reserving to the High Constable and Mari-
 schal their privileges and jurisdictions during the time of parliament,
 as formerly; and also providing, That if any member shall happen
 to commit a capital crime, or if there be a manifest hazard of the
 peace, any magistrate may attach, for securing of the person, or the
 peace, and deliver the person to the custody of the High Constable,
 in order to the parliament’s cognition the next sederunt.”

Mr Maclaurin for the pannel. — After Mr Wilkes had appeared in
 the court of Common Pleas, upon his *Habeas corpus*, and the case had
 been argued, Lord Chief Justice Pratt stood up, and delivered the
 opinion of the court to the following purport *. “There are but

* This was read from a Magazine; but the prosecutor did not dispute, that the o-
 pinion was therein fairly stated.

“ three cases which could possibly affect the privilege of a member
“ of parliament; and these were, treason, felony, and breach of the
“ peace. He remarked, that when the seven bishops were sent to
“ the tower, the plea which was used when the Spiritual Lords con-
“ tended for their privilege was, That they had endeavoured to dis-
“ turb the peace. This at that arbitrary time was judged sufficient
“ to forfeit their privilege: but, remarked his Lordship, out of the
“ four judges then upon the bench, there was but one honest man,
“ that was Powell, and he declined giving any opinion. His Lord-
“ ship then observed, that the privilege of parliament should be held
“ sacred and inviolable; and that there were three particular cases
“ in which that privilege was forfeited. It only remained to exa-
“ mine, how far Mr Wilkes’s was endangered? Mr Wilkes stood ac-
“ cused of writing a libel: a libel in the sense of the law was a high
“ misdemeanour, but did not come within the description of treason,
“ felony, or breach of the peace; at most, it had but a tendency to
“ disturb the peace, and consequently could not be sufficient to de-
“ stroy the privileges of a member of parliament.” He was im-
mediately discharged.

This opinion establishes two propositions: *first*, That the privilege of parliament secures from arrests, even for crimes, excepting treason, felony, and breach of the peace. *2dly*, That by breach of the peace is here understood a real, not fictitious breach of the peace; that is, some overt act of violence; and from these premises his Lordship draws this conclusion, That Mr Wilkes had his privilege; because a seditious libel is not an actual breach of the peace, though it had a tendency to disturb it.

The two Houses of parliament, upon a conference, did so far differ from that opinion as to find, That privilege did not extend to the case of a seditious libel. But then they differed only from this opinion as to the conclusion, not as to the premises: for they did not find, that the court of Common Pleas was wrong as to any of the two general propositions above mentioned; that is, they did not find, either that privilege of parliament could

could be affected by other crimes than those comprehended under treason, felony, and breach of the peace; or that by breach of the peace was to be understood, not an actual breach of it, but a fictitious one: so it is evident, that with regard to any other offence than a seditious libel, the matter just rests where it did before. The parliament was far from pronouncing a general decision, finding, That all misdemeanors whatever were not comprehended under privilege; but pronounced a special judgement upon the case before them, finding, that privilege did not extend to a seditious libel. And it is to be observed, that, previous to this, the parliament had declared the performance in question, to be a false, traitorous, scandalous, and seditious libel.

It was therefore wrong in the pursuer to alledge, that the pannel knew, from his attendance in the House of Commons, that the parliament resolved, that no misdemeanor fell under privilege. The resolution of parliament is appealed to; from which it appears, that parliament took up nothing, but precisely the case that was before them; and found, that privilege did not extend to a seditious libel.

As to the quotation from Blackstone, the passage is not in the first edition of his book; so that he must have added it upon the determination of Wilkes's case. There is no ground to suspect, that Mr Blackstone meant to serve any party by this addition, or depreciate the privilege of parliament in general. But as parliament went no further, than to find, that privilege did not extend to the case of a seditious libel, without impugning any of the two general doctrines laid down by the court of Common Pleas, this court will never set up, in opposition to the opinion of the court of Common Pleas, that of any lawyer, though ever so positive; which Mr Blackstone by no means is, but, on the contrary, doubtful and hesitating throughout.

Nor does the matter rest upon authority alone; for the opinion of the court of Common Pleas is founded in good sense, and the natural meaning of words, and is consonant to the laws of other nations;

all

all which conspire in establishing, that breach of the peace (*crimen fractæ pacis*) requires to its constitution some ouvert act of violence, *vis publica vel privata*; whereas Mr Blackstone's argument, from the form of English indictments, is an attempt to destroy a substance by a shadow, and overturn truth by a fiction. In the law of England, many such fictions have been introduced; and it is reasonable to tolerate them to certain effects; but it would be most improper to argue, from analogy, of them as realities. Thus in questions of seizures, the trespass or wrong done by running goods, though really it happened at Borrowstounness, or a far more distant port, is charged to have happened in the port of Leith; or if in England, supposing it has happened at Hull or Liverpool, it is always said to have happened in the river Thames. But this is a mere fiction, which it would be absurd to argue from to any other effect than that for which it was introduced. Suppose, for example, that a shipmaster has run goods at Inverness on a certain day in this month, and on the same day has committed a murder or battery on the officer of the revenue who seized them, and that the goods have been condemned in exchequer in common form, upon information that the trespass was committed in the port of Leith; could the smuggler, when tried before this court for a murder or battery, plead the defence of *alibi*, on this medium, That a cause had been determined against him in exchequer, upon the supposition and alledgeance that he had been that day in the port of Leith, which, on account of the distance, rendered it impossible for him to have been the same day at Inverness?

A seditious libel might be construed, and with great reason, by parliament, a breach of the peace. Sedition itself is one of the highest breaches of the peace: and though the liberty of the press, and other political considerations, might afford grounds for finding a seditious libel not to be a breach of the peace; yet surely it is so in the eye of common law, and in common sense. A seditious publication is evidently an ouvert act; for publication undoubtedly implies so much: and as a man who should run into the streets, and call

call aloud to the people to assemble, take arms, and attack the government, would certainly commit a breach of the peace; so it seems reasonable to hold, that he who endeavours to stir up such sentiments by a publication does the same, as it is a matter of no consequence, whether the contagion of such sentiments be communicated to the people by words or by writing. It is indeed true, that such publication, though an *ouvert* act, is not a *vis* or violence: but as it is intended, or may be presumed to be intended, seeing it often has had, and probably will have, the consequence to produce sedition, which is one of the highest breaches of the peace, there was great reason for finding that it fell under the third member of the exception above mentioned, viz. a breach of the peace. But surely this position cannot be so wiredrawn as to establish, that every misdemeanor is a breach of the peace, because indictments in England, *fictione juris*, alledge it to be so.

If the law stands so as that members of parliament can only be arrested or tried for treason, felony, and breach of the peace, it is sensible and salutary; it takes a proper care both of the privilege of parliament-men, and the security of other subjects: for treason, felony, and breach of the peace, comprehend every crime that is of an heinous nature, or *more impatiens*, that is, which calls for an immediate trial, and that both with regard to the public and individuals, such as, murder, rape, robbery, assaults, batteries, &c.; and excludes only crimes that are attended with no great degree of guilt, or with difficulty of proof, and tediousness of investigation, such as, usury, extortion, oppression, smuggling, bribery, and corruption, &c. So that it is clear the law, explained as above, extends the privilege only to such crimes as are petty or occult, not to such as are atrocious and flagrant.

Nor can it reasonably be objected here, That it would be dangerous to protect members of parliament, and their servants, from arrests for crimes: for the law does not presume, that members of parliament, men of eminent character and fortune, chosen by their country, will be ready to commit crimes; and in fact they seldom do;

do; which justifies the presumption in law: nor does the law presume, that such men will be ready to protect their servants when they have committed crimes; and such servants cannot have any benefit from their master's privilege without his interposition; so that seldom can any inconvenience arise in this respect. But tho' there should be inconveniencies, these cannot be pleaded before a court of justice; the legislature alone can be applied to. And accordingly it has been applied to, and has given redress by several late statutes; which do by no means, as insinuated in the answers, constitute this privilege, but have only explained it; for that privilege subsisted long before, and is now, and all along has been, enjoyed by the common law.

If the law then so stand, that a member of parliament can only be tried and arrested for treason, felony, and breach of the peace, the only question is, Whether bribery and corruption be a breach of the peace?

This it clearly is not, being neither an act of violence, nor so much as an overt act, but only a latent and occult crime, if it is a crime at all, at common law: as to which by and by.

Whether bribery and corruption fall within the third member of the exception, has never been determined but once, even according to the pursuer's own showing, in the case of Lord Tankerville; and that is in point against him. Though it had never been decided at all, yet surely this court will not be desirous of determining against privilege, upon a case that had never come under consideration in the House of Commons.

And here it is to be observed, that though the answer to the plea of privilege, That every misdemeanor is *contra pacem Domini Regis*, and consequently a breach of the peace, were good in England; yet it does by no means follow, that such answer would be good in Scotland; because the law and style of indictments is different in this country, we having no such fiction amongst us: so that it is plain, that to make this answer good in Scotland, there must be an accumulation of fictions; first, it must be feigned in England, that eve-

ry crime is a breach of the peace, because so charged in the indictment; and, next, it must be feigned in Scotland, that every indictment there is in the same style, and of the same nature, with indictments in England; which is extravagant beyond measure.

There are several reasons in this country for rather extending than limiting the privilege of parliament, that do not apply to England. For, in the *first* place, a member is much longer detained from the House by a trial here than in England: for here we are 400 miles from the parliament; in Westminster-Hall, they are but a few yards. *2dly*, In England there are several checks against malicious or trifling accusations; here there are none. The King's Advocate may sue whom he pleases; and though he refuses his instance, a private party may compel his concurrence. There is no regulation before the court of Justiciary, as before the Session, for preventing trifling matters being brought before it; and several instances of the most nugatory and ridiculous trials before this court might be given *. *3dly*, In England, in petty crimes, one may appear by attorney; here he cannot.

Though there is no danger, that the present King's Advocate would bring vexatious trials, yet the great jealousy which parliament entertains of privilege, arises from apprehensions of regal power. The crown, it was justly said the other day, may detain the whole forty-five members of this country. To this no answer was made, but a rhapsody about the firmament falling. However, the case is by no means imaginary. Charles I. came to the House of Commons with an armed force, in order to apprehend six of the

* Not long before this, a gentleman was brought to trial before the Justiciary for pulling another by the nose. The charge was found relevant, but a submission took place soon after.—A gentleman was tried before the circuit at Glasgow, for giving another a slap on the face. One of the two judges on this circuit was for dismissing the libel as unworthy the cognisance of the court; but the other said, it was the prosecutor's privilege to bring the trial either before the supreme or an inferior court. The trial went on; and the jury brought in a verdict, finding the defender not guilty; upon which he was dismissed, and had full costs.—See No. 7.

first members of the House; seven Lords of parliament were committed to the Tower at once; and in history, and in the State-Trials, many other instances to the same purpose are to be found. But surely it will not be reckoned an imaginary case, that the crown may wish to detain one: and there can be no doubt, that the absence of one member may have the worst consequences, as he, by his speech or his vote, might have given a very different turn to the most important debates and determinations.

The plea of privilege is not put in here absolutely. Mr Dempster does not contend, that he shall not be brought to trial while the privilege of parliament is current; but he sets forth, that he ought not to be tried now, because he has been called by the King's proclamation to attend the parliament, which is sitting at present, and was met long before the days of his compearance were run.

It would be a strong thing to detain a member of parliament in such circumstances; especially considering the nature of the offence charged; which is entirely new, there being no instance of such a trial since the institution of this court: and it may well be doubted, if the offence charged be relevant, as it is not laid upon the statute of the 16th of the late King, which does make the giving of money to electors, on certain occasions, an offence, but it is not at common law.

There are many political evils guarded against by special statutes; and the committers of them may be tried, no doubt, upon these statutes, but cannot at common law; for example, usury may be tried upon a particular statute; so may smuggling, so may bribery and corruption, but not at common law.

Usury is undoubtedly not unlawful at common law; for there is nothing to hinder a person to take any covenanted sum on account of forbearing to demand his money. It is lawful at present to take 5 *per cent.* but it is not lawful to take 10 or 6, though it was so very lately: and the illegality of taking more than 5 *per cent.* arises from particular statute; and on that only the libel for this crime can be laid. In the same way, it is lawful to import foreign commodities,

dities, without paying any duty to the King; and it is only unlawful to import certain sorts of them without paying such duty, and many commodities may be imported duty free; consequently a libel for smuggling can only be laid on a particular statute.

In the same way, it is not unlawful to influence the votes of electors in one's favour, but only to do so on certain occasions, and in a certain way, by giving them money. It is not unlawful to solicit, to use interest, and so forth: nor is it unlawful even to give money on every occasion; as, for example, money may be paid for obtaining the office of town-clerk, and many others. In France, and other countries, it is lawful to purchase the office of supreme judge in the different courts. This indeed is discharged in England by particular statute; but purchasing commissions [in the army is not unlawful, and is every day practised. From all which it is evident, that bribery and corruption is an offence merely political and statutory; which consequently cannot be tried but upon the laws which introduced it.

The spirit and motives of this prosecution likewise afford no reason for making a stretch in this case. Were the crime charged atrocious; were the public, or the public's representative, Lord Advocate, calling aloud for justice; there might be some reason for straining; but as the crime is not atrocious, as the public prosecutor has refused his instance, as the offence charged is quite new, doubtful if relevant; and as this trial evidently takes its rise from political disappointment, it is the very reverse of being favourable."

An incident occurred during the course of the pleading, which affords pretty good evidence, that this point had not been settled in England. Mr Solicitor, for the pannel, in support of his reasoning, read a passage from Blackstone's Commentary, b. 1. c. 2. which, in the first edition, (and it was that he had), stands thus: "But this privilege does not hold in crimes of such public malignity as treason, felony, or breach of the peace, or rather, perhaps, in such crimes for which surety of the peace may be required." But the counsel on the other side looking into their copy of this book, which was a subsequent

quent edition, found, and read, a contradictory passage; which is as follows: "The statute of 1^o Ja. I. c. 13. and that of King William, (which remedy some inconveniencies arising from privilege of parliament) speak only of civil actions; and therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes, or, as it hath been frequently expressed, of treason, felony, and breach (or surety) of the peace; whereby it seems to have been understood, that no privilege was allowable to the members, their families, or servants, in any crime whatsoever; for all crimes are treated by the law as being *contra fidem et pacem Regis*," &c.

O P I N I O N S.

AUCHINLECK. As the plea of privilege has been entered and contested, it is the duty of the court to give judgement. I have always considered, that in civil questions, in which the defender's presence is not necessary, it would be a benefit if some rule were made to oblige members to wave it. In criminal matters, other considerations come in. In these the pannel must, by the law of this country, be present, and in effect be in custody. No man in this country can be tried in his absence.

The argument new to us. The view in which I consider it is, that, excepting in higher crimes, which we all know, if the defender sets forth good cause for delay, the court will always delay till he attends. It would be very odd if the House of Commons, which hath given privileges in many cases in which they ought not to have been given, should yet refuse privilege or delay when it ought to be given. I think it is reasonable, in this case, the pannel should have privilege. Though there were no privilege of parliament, I think there would be good cause of delay. It is reasonable he should have this privilege; and therefore I think he has it. I think we have an instance exactly in point: Case of Lord Tankerville. How many trifling offences may be brought to trial here? A bad neighbour
may

may bring one to trial for breaking a dam-dike, and get the concurrence of the Advocate. Should we in such a case allow a member to be stopped from his duty in parliament? By no means.

KAMES. The case is so clear, that I shall use but few words. The defender is bound to be in parliament: that is his superior duty. Put the case, that in the middle of his trial, a messenger was sent for the pannel, commanding his attendance upon his duty in parliament. We cannot oblige him to find bail, or to attend here. At the same time, that crimes may not remain untried, I am for delaying until there is a probability that the session of parliament will be over.

PITFOUR. It is part of our happy constitution, that the representatives in parliament shall have full liberty to attend their duty. This I have not founded on any authorities, but on its being essential to the constitution of parliament. Some crimes are excepted; but it lies upon the prosecutor to show, that the crime libelled falls under the exception. He must show some additional exception made by the House. I do not think the crime libelled falls under any of the exceptions. In our law, the same rule as in the law of England. Common sense is common sense every where. Capital crimes and the peace are the only exceptions in either country.

The Lord Chief Justice took *the peace* too narrow. I think the House took it better up. Was it not calling out the people to rise up like mad dogs? was it not calling them out to break the peace? They did not extend the exception; but what suppose they had?

I do not understand what the prosecutors found on the words *fidem et pacem*. I do not understand that *constructive* peace. If there are *five hundred crimes* which do not fall under the denomination of *treason, felony, or breach of the peace*, it would be so much the worse to refuse privilege. Next, crimes never prescribe *. I will not suppose oppressive King's Advocates; I need not suppose them: but I

* But a contrary opinion has since been given. See Macgregor's case in 1773.

may suppose, that on the eve of an election, when there is always opposition, twenty or thirty of our members may be made prisoners for small crimes, and kept from their duty in parliament. Tankerville's case precisely in point: we must therefore stop while parliament is sitting.

COALSTON. The privilege of parliament is essential to our constitution; yet I shall never be for giving privilege where law has not given it. Whenever privilege is pleaded, the pleader must prove it: as it has been pleaded, we must determine it. If there is privilege, we cannot take bail: if we delay on other grounds, we must take bail.

Privilege has never been precisely determined. In Wilkes's case, there is an extension. I do see in the English law-books a distinction made between crimes that are indictable, and crimes that are not. I see privilege is not pleadable against indictable crimes. Blackstone says so. Jacob's Law-dictionary says the same. The case is therefore doubtful; and I think we ought not to proceed without informations. No case needs them so much as the present, in which we are to draw the line between the liberty of the subject and the privilege of parliament. Far am I from saying, that I am against privilege: I rather incline to give it in this case. We are told this case is to go before the House of Commons; the rather ought we to have informations, that the grounds of our opinion may be known to all the world; for how would it look, if our judgement this day shall differ from that of the House of Commons?

JUSTICE-CLERK. Had I any doubt, I would be clear for informations. Privilege essential to the being of parliament. I will hold hypothetically, in the present shape of the case, that bribery is actionable as now brought to trial; and will consider the case in that light. The prosecutors, in their answers, have boldly maintained, That privilege is not competent in any criminal matter whatever. They bring no authority to support this, excepting Blackstone, (who I suspect is not thoroughly understood). The whole authors, from Lord Coke downwards, have taught, that privilege takes place
in

in crimes, some cases excepted. Put the case of arbitrary times: our fathers have seen them, and our children may see them again. If for small crimes the persons of members are not safe, the privilege of parliament is at an end. Bribery falls under none of the three cases excepted. It is neither treason, felony, nor breach of the peace.

Case of Lord Arundel strong, and in point, for a misdemeanor. The prosecutors say, that it was in a time of confusion, and has been since altered by many other judgements. That is not so. I do not see one. It stands unhurt from that time to this as the standard of privilege.

Wilkes's case: Who ever doubted his offence was heinous? The judge who presided in the court of Common Pleas did not doubt that it was a crime, but whether it fell under the third exception. The judgement therefore in Wilkes's case establishes, that privilege is competent in crimes.

The prosecutors appealed to many here who were present at the determination of Wilkes's case in the House of Commons; and it was said those persons must know, that the whole argument went upon this, that privilege was competent in no crime. I was a member of the House of Commons, and present when Wilkes's affair was judged; and after ransacking my memory, I cannot recollect any one lawyer that maintained that general proposition. I have been through the whole books of adjournal. I must say, if there be no privilege of parliament in smaller crimes, the freedom of this constitution stands upon the most slender foundation.

The court, Dec. 7. 1767, pronounced the following interlocutor on the petition. "Find, That this court can issue no warrant for
 "apprehending the person of George Dempster, Esq; member of
 "parliament, nor for compelling him to find bail to appear, and
 "stand trial upon the criminal letters mentioned in the said petition,
 "during the sitting of parliament, or within the time of privilege;
 "and therefore declare they will adjourn the diet of the said criminal

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"nal letters from time to time during the continuance of said privilege."
"lege."

And afterwards "having considered the foregoing resolution of
"court, continue the diet at the instance of Robert Geddie and Mr Robert Macintosh Advocate, against George Dempster of Dunnichen,
"Esq; Advocate, till the second Monday of March next to come;
"and ordains parties, assizers, witnesses, and all concerned, then to
"attend, each under the pains of law."

Against these interlocutors the prosecutors entered an appeal to the House of Lords. It was at this time a moot point, Whether an appeal lay from the court of justiciary? This question was therefore remitted to a committee; and before them Mr Macintosh argued at great length for the competency of his appeal. Mr Dempster did not appear upon that occasion. The House of Lords did not, it seems, at that time chuse to determine the general question, as to the competency of an appeal from the court of justiciary; but being of opinion, that the determination of the court below was erroneous, the following judgement was given, March 7. 1768. "Upon report from
"the Lords committees, to whom it was referred to consider, whether the appeal wherein Robert Geddie junior merchant, and Robert Macintosh, are appellants, and George Dempster, Esq; and
"Christiana Adamson *, are respondents, being an appeal from two
"interlocutors of the court of justiciary in Edinburgh, of the 7th
"December 1767, and also another interlocutor of said court, of the
"14th of December 1767, be properly brought, it is ordered by
"the Lords Spiritual and Temporal in parliament assembled, That
"the petitioners do, by themselves or agents, attend the court of justiciary on Monday next, being the day to which the diet is continued by the second interlocutor, bearing date 7th December last;
"and in case the declaration in this first interlocutor, bearing date
"the same day, should be pleaded as a bar to the due course of ju-

* He and several other persons cited as witnesses by the prosecutors, had got a decree for their expences.

“ ftice, then that the petitioners do apply to the fame court, to re-
“ confider whether they were authorifed by the common or ftatute
“ law of the land to take cognifance of the fubject-matter, and to
“ make fuch declaration; and it is further ordered, that the faid
“ court be at liberty to proceed notwithstanding faid appeal.”

The profecutors accordingly, upon the 14th of March, appeared before the court by their counfel; Mr Dempfter not having arrived from London, the diet was adjourned till Friday the 18th.

Mr Dempfter having appeared that day, the counfel for the profecutors moved, that the criminal letters might be read, and trial proceed.

To this Mr Dempfter answered, “ That in moving a plea of privilege he had never any other intention, but that he might not be
“ obftructed in his attendance in parliament, which he confidered
“ a duty fuperior to that of any other kind; that this reason had
“ now ceafed, and therefore, that though it was his opinion, and he
“ could plead, that privilege of parliament extended to every cafe,
“ except treason, felony, and breach of the peace, ftill he did not
“ defire to reft upon any fuch defence, but was willing to go to trial
“ in fuch time as the court fhould direct, having due confideration
“ to the conveniency of all parties concerned.” Upon this the court pronounced the following interlocutor. “ Having confidered their
“ interlocutor of the 7th of December laft, with the judgement of
“ the Houfe of Peers of the 7th of March current, and what is before
“ reprefented; in refpect the defender does not infift on his plea of
“ privilege, as fufained by faid interlocutor, find there is no place
“ in this cafe to reconfider the ground of the faid interlocutor; but in
“ refpect of the faid judgement of the Houfe of Peers, they declare,
“ That the faid interlocutor fhall be no precedent to any future cafe
“ of the like nature, and that the matter fhall lie open to the confi-
“ deration of the court upon any fuch future cafe, in the fame man-
“ ner as if the faid interlocutor had not paffed.”

The criminal letters were then read: to which Mr Dempfter plead-
ed, Not guilty; but the diet was continued till Monday the 21ft,
upon an objection from Mr Dempfter’s counfel, That none of the
profecutors

prosecutors were present; for which reason they insisted, that the diet should be deserted, as the absence of the prosecutors deprived him of their oaths of calumny.

Upon the 21st Mr Geddie appeared; and a petition being preferred for Mr Macintosh, setting forth an excuse for his not attending, that was sustained, the competency and relevancy of the charge was then argued on the part of the defender by Mr Maclaurin *, Mr Dalrymple, and Mr Solicitor; on the part of the prosecutors by Mr Smith, Mr Wight, and Mr Lockhart. After the pleadings were over, the court said, they would chuse to have the debate reduced into writing; and therefore ordered informations.

The information for the prosecutors, by Mr Wight, after narrating the procedure in the trial, and reciting the material parts of the libel, proceeds to answer the defences as follows.

"The *first* of the defences was, That the libel was not competent, in respect it was not laid upon any particular statute, but upon the common law, and that the crime of bribery was unknown in the common law of this country; and in support of the last branch of this defence, reference was made to Sir George Mackenzie's Criminals, p. 174. where he mentions several crimes punished amongst the Romans, which he supposes not to be directly in use in this country; and the prosecutors were called upon to produce one instance of a trial brought before the court for this crime.

But, in answer to this, it may be, in the *first* place, observed, That as several statutes have passed, inflicting particular penalties and punishments upon those who are guilty of corruption in matters of election, the libel must be competent, in so far as it is applicable to those statutes.

It was indeed maintained upon the part of the pannel, That no indictment can be laid upon a statute, without libelling the sta-

* His argument was principally levelled against the position, That bribery is a crime, and indictable, by the common law of Scotland. It is stated in the information for the defender.

tute itself. But this is a doctrine to which the prosecutors can by no means assent. Statutes are part of the law of the realm; and of consequence, a libel that charges a certain act or deed to be a crime by the laws of the realm, must be competent, whether such act or deed is understood to be of a criminal nature by the common law, established by a tract of decisions, and inveterate consuetude, or by a particular statute, inflicting a particular punishment.

To illustrate this position seems altogether unnecessary. Many acts of parliament have passed with regard to the crime of theft, but few or no indictments are to be met with that libel any of these acts. It is sufficient that they mention the act of theft to be a crime by the laws of the realm in general. Many other similar instances might be pointed out, were it necessary; but it will be sufficient to observe, that the doctrine here pleaded for the pannel, must resolve into this absurd proposition, That an act or deed, which tends, if not to the immediate subversion, at least to the imminent danger of the constitution, and against which severe sanctions and penalties have been enacted by statute, is not a crime by the laws of the realm.

There is indeed one distinction betwixt libels which are laid upon the laws of the realm in general, and those which are expressly laid upon particular statutes, inflicting particular punishments; but this distinction affects not the competency of the libel, but the power and discretion of the judges. The peculiar situation of the kingdom, at a particular occasion, may render it necessary for the legislature to enact a severer punishment upon those who are guilty of particular transgressions, than what such transgressions were formerly understood to merit, or was imposed upon them by the more ancient law. In such cases, a libel may be laid, either upon the laws of the realm in general, or upon the particular statute, inflicting the severe punishment. If it be laid on the statute the judges will be bound to inflict that punishment which the statute enacts. But if it be laid in general terms, they are not bound to exert any further severity than what was understood to be the proper punishment

punishment before such statute was enacted. This is a just distinction, founded in reason and humanity; but to suppose that the libel is not competent, because it does not recite a particular statute, inflicting a particular punishment, seems to be not a little absurd.

In the *next* place, The prosecutors, with submission, apprehend, that the facts charged in the criminal letters, constitute a crime by the common law of this country, independent of the particular statutes that have lately been enacted.

The counsel for the pannel were anxious to confine the idea of the word *common law* within very narrow bounds, as if nothing was to be thereby understood, but the custom and practice of the country, established by judgements of the supreme courts; and because no instances were given upon the part of the prosecutors, of trials of this kind from the books of adjournal, they hastily concluded, that bribing was not a crime at common law.

But this argument proves too much. There are many crimes known in the law of this country, and to which severe punishments are annexed, that are not mentioned in any statute whatever. They have indeed been frequently the subject of trials, and the persons guilty of them have been condemned. But how came the first person that was tried for such crimes to be condemned? No statute could be urged against him; and if the pannel's doctrine be true, it was equally impossible to alledge, that the transgression laid to his charge was a crime at common law; which, according to his argument, supposes a course of judgements in the criminal court, as the only *succedaneum*, in cases where there is no positive statute.

But further, the prosecutors apprehend themselves to be well intitled to maintain, that the facts charged in the present libel are criminal by the common law of this realm, in respect that bribery was a crime by the law of the Romans, which, in several acts of parliament, is admitted to be the common law of the kingdom, and which, according to the writers of this country, both lawyers and historians,

historians, is acknowledged to be our rule, where our own statutes and customs are silent or deficient. See Skene's Annotations upon *Regiam Majestatem*, l. 1. c. 7. ver. 2.;—Craig, l. 1. dieg. 2.;—Leslie, l. 1. cap. leg. Scot.—Boet. l. 5. Hist.—Camer. de Scot. doct. l. 2. cap. 4.—Nor will the passage quoted from Sir George Mackenzie's Criminals avail the pannel: for though he ranks the *crimen ambitus* amongst those which are not directly in use with us, which was extremely natural, considering how little it was practised in his days; yet, in the latter part of his observations, he plainly shows it to be his opinion, that it was punishable in this country as well as amongst the Romans.—His words are, “And since commissioners for parliaments, and magistrates of towns, are still elected by plurality of suffrages, I see not why such as bribe the electors may not be liable to the same accusation. The punishment of this crime was deportation; which was much like our banishment: and in the lesser towns it was punished by a fine of a hundred crowns, and infamy. And since it is a kind of bribing, I think it should be punished with us as such.”

That bribery in matters of election was a crime prior to the statutes which have been particularly directed to the prevention of it, is likewise clear from the preamble of the act of George II.; which begins with the following words: “Whereas it is found by experience, that the laws already in being have not been sufficient to prevent corrupt and illegal practices in the election of members to serve in parliament,” &c.—These words plainly shew, that this statute was by no means creative of a new crime, formerly unknown in the law; and that, on the contrary, it was only enacted to give a new remedy, by inferring certain penalties and disqualifications, and making it in effect the object of a civil action to any common informer.

The counsel for the pannel endeavoured likewise to support this plea of incompetency by analogy. They observed, that no prosecution lies at common law against usurers or smugglers, although such persons

persons may, with the strictest propriety, be considered as guilty of criminal acts.

But with respect to usurers, the counsel for the pannel seem to have altogether misapprehended the law. It appears indeed, that by our old law, usury could not have been made the foundation of a prosecution during the usurer's life; but in case he repented not before his death, his whole moveable goods and chattels were forfeited to the King, and his heirs were likewise deprived of his heritage, as appears from the *Regiam Majestatem*, l. 2. cap. 54. Besides, the statute of James VI. parl. 11. cap. 52. which is the first act of parliament made against usurers, appoints them to be punished conform to the laws of the realm; which shews, that at that time it was understood to be a crime at common law.

Nor can the pannel avail himself in the smallest degree, of the declaration made by the justices, in the case of Hugh Roxburgh, as stated by Sir George Mackenzie, in his title of *Usury*; because in that case the question was not, Whether usury was punishable as a crime? but only, Whether the taking more interest than L. 6 *per cent.* could infer usury, as the act 1649, by which interest was reduced to so low a rate, was rescinded after the Restoration?

Again, with regard to smuggling, the prosecutors can by no means agree, that it is not an offence even at common law, and as such the proper subject of a criminal prosecution; though no case may hitherto have occurred, where it was thought expedient to bring such offenders to trial, otherwise than by prosecutions upon the revenue-statutes, for recovery of the forfeitures and penalties thereby inflicted. It is a species of theft, whereby the crown is defrauded of its just rights, by the criminal act of the person guilty; and therefore, as every other offence of that nature, committed against the statute-law of this country, and whereby third parties suffer damage, might be criminally prosecuted. But be that as it will, no argument can from thence proceed by analogy to the case in hand.

Bribery

Bribery in matters of election, is a transgression of a very different nature, tending not only to corrupt the morals of the people in general, but likewise dangerous in the highest degree to the constitution itself. For, as is well said by an eminent writer on the criminal law of England, "Nothing can be more palpably prejudicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both King and people doth depend, disposed of, not to those who are most able to execute them, but to those who are most able to pay for them: nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those, who, by their industry and diligence, have qualified themselves for them, conferred on such, who have no other recommendation but that of being the highest bidder. Neither can any thing be a greater temptation to officers, to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expence they were at in gaining their places, and the necessity of sometimes straining a point, to make their bargain answer their expectation."

It was further argued upon the part of the pannel, That as the statute of the 2d of the late King, imposing penalties and disqualifications upon those who should be guilty of corruption in the election of a member of parliament, was extended by the act of the 16th of his late Majesty to the election of commissioners from boroughs, it from thence appears, that bribery in the election of magistrates and counsellors, was, *ex proposito*, omitted; and that, on that account, the criminal letters are altogether incompetent, in so far as they charge the pannel to have been guilty of bribery in order to influence the last Michaelmas election.

But to this an obvious answer occurs, viz. That the criminal letters are not laid upon these statutes in particular, but upon the laws of the realm in general: and if bribery in the election of a commissioner or delegate from a borough, is a crime at common law, e-

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very act of bribery committed with the same view must be equally criminal: and it is particularly charged in the present case, that the bribery committed at the annual Michaelmas election was done with the view of securing to the pannel a majority of votes in the election of a commissioner or delegate to be chosen by the borough. How far the objection might go, had the criminal letters been laid upon the statutes only, it is not *hujus loci* to inquire.

The next defence stated for the pannel was, That by the established practice of the criminal court, every prosecution must be brought either at the instance of his Majesty's Advocate, or in the name of a private party having interest; but that the present prosecution was brought by private parties, who qualify no interest, and who conclude merely *ad vindictam publicam*.

The counsel for the pannel seemed to lay their chief stress upon this plea, and spoke to it at great length. They observed, that even in republics, the bad consequences arising from admitting popular actions were very soon discovered: That in order to prevent these consequences, an oath of calumny was first invented; and that not being sufficient, the *scriptio in crimen*, by which the prosecutor bound himself to suffer the punishment of the law, in the event of his failing to convict the pannel, was found necessary to put a stop to wanton and vexatious actions: That this last remedy, however, came not only to be a complete bar to false accusations, but likewise a total prohibition of prosecutions at the instance of private persons, no man being willing to venture his life and fortune in bringing to punishment a criminal who had done him no personal injury, however beneficial it might be to the state to have the criminal destroyed; and therefore, in all modern governments, it was an established system to reject popular actions: That in England, though every man may present a bill to a grand jury, yet that jury must find the bill true, before a person accused of a crime can be brought to a petty jury; and that no information can be filed, in matters criminal, but by the attorney-general, *ex officio*, or upon leave given by the court: That in this part of the united kingdom, the King's Advo-

cate stands in place of the grand jury ; and that although he cannot refuse his concurrence to a party having interest to prosecute, no example can be given of a private prosecution having been sustained in this court, except where an interest, either in property, person, or character, has occurred : That the sustaining the titles of the present prosecutors, would be allowing a precedent for these popular actions, which the laws and constitution of this kingdom have so wisely endeavoured to restrain ; and that the criminal court, in that event, would be harassed with an infinity of wanton and groundless prosecutions.

In answer to this, the prosecutors will readily admit the superior wisdom of modern governments, in appointing a *calumniator publicus* for the prosecution of public crimes, and in restraining those who can qualify no interest, more than any other individual, from maintaining criminal prosecutions : but at the same time they apprehend, that it would be of equally dangerous consequence, to confine what is called an interest within too narrow limits, especially in crimes which have an immediate tendency to affect the well-being of the constitution : and it will appear, upon reflection, that the doctrine laid down by the pannel's counsel goes too far.

It will not be denied, that a son, or any other near relation, is intitled to prosecute, in his own name, for murder ; yet it cannot be said, that such prosecutor is hurt, either in his person, goods, or character ; and the criminal prosecution can go no further than to obtain public vengeance. It is true, indeed, that he is connected by family with the person murdered ; and therefore a new interest appears ; and of consequence it would seem to follow, that every person who can show, that he has a connection with the subject of the prosecution, which the lieges in general have not, must have an interest to maintain the action in his own name, without the instance of his Majesty's Advocate.

To apply this principle to the present case, it will only be necessary to consider the character in which the prosecutors appear on the face of the criminal letters.

Mr Geddie was a bailie in the borough at the very time of the transgressions which are the subject of the present prosecution: he falls therefore to be considered as one of the guardians and protectors of the freedom and independency of the borough: it was his duty to maintain them by every lawful means; and it was equally his duty to take every measure that might have the effect to prevent, in time coming, an attack upon the purity or chastity of the borough, or upon the morals of its inhabitants. But no other method could be so effectual for that purpose as a criminal prosecution of this kind. The wisest laws are of no significance, unless they are carried into execution; whereas one example of public justice upon the transgressors of these laws, may be the means of rendering a second exertion of them altogether unnecessary.

Let it be supposed, that the Michaelmas election of magistrates and counsellors had been overawed by force, and that thereby Mr Dempster had been able to introduce such a set of magistrates and counsellors, as would secure to him a majority of votes in the election of a delegate to be chosen by the borough; would it not, in that event, have been competent to Mr Geddie, as one of the chief magistrates of the place, to have maintained a criminal prosecution against those who had used the force? It is humbly thought, that such prosecution would have been perfectly competent: and if so, it is difficult to conceive why it should not be equally competent to him to prosecute those who have been guilty of bribery for the like purposes.

Again, with regard to Mr Macintosh, he had declared himself a candidate for being chosen to serve as member of parliament for the district, before any of the acts of bribery libelled had been committed, and was chosen a guild-counsellor of the borough of Cupar in Fife at the last Michaelmas election, and put upon the lect for the office of provost: unless therefore he can be allowed to have an interest, it is absolutely impossible to figure an interest that any private party can have to prosecute for a crime of this nature. The bribery was directly levelled at him, and was practised with no other

view than to overturn the interest he had established in the borough, and to secure to the pannel a majority of voices in the election of the delegate.

It was indeed observed, that the loss which Mr Macintosh has suffered, may be repaired by the civil action depending before the court of session. But that is a matter of no consequence to the present question. A person whose goods have been stole, may sue for restitution before the civil court; nay, he may vindicate them from a third party: but, this notwithstanding, he will be intitled to maintain a criminal prosecution against the thief *ad vindictam publicam*.

The prosecutors will beg leave to mention an example of a criminal prosecution sustained at the instance of a private party, where his interest was much more remote than theirs, viz. the case of Mr Lockhart of Lee, who maintained a criminal action at his own instance against certain persons who had been guilty of riots in the town of Lanerk, in opposition to the settlement of a Reverend Gentleman, to whom, as patron of the parish, he had given a presentation. It cannot be said, that Mr Lockhart was by these riots hurt, either in his person, goods, family, or character: yet, this notwithstanding, his connection with the cause of the riots was deemed a sufficient interest to intitle him to maintain the suit; and several of the pannels were found guilty, and condemned.

Nor will the allowing persons to prosecute, who have such an interest as the present prosecutors, ever be attended with any bad consequences. The concurrence of his Majesty's Advocate is absolutely required: and although few instances may be found, where it has been necessary for him to refuse that concurrence; yet if he is satisfied, and can show, that there is no foundation for a prosecution, he must certainly be intitled to withhold it. It is made necessary, in order to give a check to private parties, whose resentment may sometimes carry them beyond proper bounds. It is therefore absurd to suppose, that he is obliged to grant it in every case. On the other hand, the prosecutors will be allowed to say, that if the objection made to their title shall be sustained, no prosecution

cution of this kind may probably ever take place. Transgressions of this nature, however prejudicial to the constitution, are become too common to be viewed by the generality of the people in that light in which they ought to appear: and perhaps a public officer might be thought rather too rigorous, were he, of his own accord, to apply to the criminal courts against the offenders, who are generally men of rank and fortune, and who, were it not for their error in overlooking the consequences, and bad tendency of their misconduct in that particular, would be most worthy of the public esteem: and the prosecutors will be allowed to think, that, on that account, it would be more expedient to sustain the title of those who are immediately affected with the consequences of the bribery, and who are connected as magistrates and counsellors with the borough where it has been practised, than to find that they have no interest to prosecute.

It was observed by one of the counsel for the pannel, That Sir John Gordon had admitted his having no interest to prosecute as a private party, when he insisted, that the Lord Advocate should, at his own instance, prosecute a gentleman upon the common law, who was accused of having been guilty of corruption in a northern borough. But Sir John Gordon was no magistrate or counsellor of that borough, nor had he any connection with it; he was only *quibet ex populo*: and as those in whose name the civil prosecution had been carried on, were unwilling to become prosecutors in a criminal action, he had no other method left, but by applying to the public prosecutor to take up the cudgels for the public interest.

The only other defence pleaded upon the part of the pannel was, That the libel, so far as it subsumed, that he had attempted to corrupt, or attempted to procure, and made offers which were not accepted of, was clearly not relevant.

The prosecutors will readily agree, that a mere intention to commit a crime, where no overt act is done, with a view to carry it into execution, is not the subject of punishment. It is indeed impossible to prove such intention; and even though it were capable of

of proof, it ought to be presumed, that he who had done nothing to carry it into execution, had immediately repented of it. But the case is very different, where not only an intention is conceived in the mind, but likewise an attempt made to execute that intention. In that case, there is no room for the presumption of repentance, and punishment ought to be inflicted; though, no doubt, the measure thereof ought greatly to depend upon the nature and mode of the attempt.

That this was the doctrine of the Roman law, there cannot be a doubt. Many texts might be quoted in proof of it; but two or three only shall be mentioned. In *l. 1. pr. ff. De extraord. crim.* it is said, “Solicitatores alienarum nuptiarum, itemque matrimoniorum interpellatores, et si effectu sceleris potiri non possunt, propter violentiam perniciosæ libidinis extra ordinem puniuntur.” — And in sect. 2. of the same law, “Qui puero stuprum, abducto ab eo vel corrupto comite, persuaserit, aut mulierem puellamve interpellaverit, quidve impuditiæ gratia fecerit, donum præbuerit, pretiumve, quo is persuadeat: dederit, perfecto flagitio, puniuntur capite; imperfecto, in insulam deportantur: corrupti comites summo supplicio adficiuntur.”

The *Lex Cornelia de sicariis*, likewise not only punished those who were guilty of actual murder, but also those “qui homines occidendi furtive faciendi causa cum telo ambulaverint; *l. 1. Ad Leg. Cornel. de sic. et venefic.*” Or, “Qui venenum necandi hominis causa fecerint, vel vendiderint, vel habuerint.”

The different degrees of punishment to be inflicted on those who attempted to commit crimes, are accurately laid down by Puffendorff, in his treatise, *De jure naturæ et gentium*, lib. 8. cap. 3. § 18. “Circa singula horum delictorum primum locum obtinent delicta consummata; postremum, quæ ad actus aliquos, non tamen ultimum, processerunt, in quibus tanto quodque est gravius, quo ulterius processit. Ubi observandum naturaliter propositum et desiderium facinus aliquod patrandi, haudquaquam pari gravitate cum ipso facinore perfecto censeri posse; quippe cum longe atrocior

“trociore sese mali facies animo representat. Quando igitur ali-
 “quando voluntas facto æquipollere dicitur, id intelligendum est de
 “illa voluntate quæ cum extremo conatu conjuncta est; sic ut inter
 “hanc, et eventum facinoris, nulla nova voluntatis operatio locum
 “habuerit, et si successus destinatus defecerit.”

The same doctrine is laid down by Sir George Mackenzie, in his
 treatise of Criminals, tit. 1. § 4. “It is likewise much debated, whe-
 “ther an endeavour to commit a crime be a crime, albeit the effect
 “follow not, and albeit it be a rule in the civil law, that, in *malefi-*
 “*cii voluntas spectatur, non exitus*, l. 1. § 14. *Divus. ff. ad leg. Corn.*
 “*de sicar.*; yet it is generally concluded by the practitioners of all na-
 “tions, that *simplex conatus*, or endeavour, is not now punishable by
 “death; *Clar. quest. 91. Gothofr. § Conatus*. But for clearing this
 “according to the principles of reason, I shall form these conclu-
 “sions: *first*, That all endeavour is an offence against the common-
 “wealth, though nothing follow thereupon; albeit sometimes the
 “punishment be connived at, or mitigated, according to the feve-
 “ral degrees of malice: but that it is in itself criminal, appears
 “from this, that simple design is punishable in treason, and some
 “other atrocious crimes; because in these, especially in treason, it
 “would be too late to provide a remedy when the crime is commit-
 “ted. *Second*, In less atrocious crimes, the design is punished, if
 “the committer proceeded to act that which approached nearly to
 “the crime itself, *si deventum sit ad actum maleficio proximum*.—But
 “this is not *simplex conatus*, but in effect is a lesser degree of the
 “crime to which it approaches; as if a thief have put ladders to the
 “house which he resolved to rob; or, if he mix poison, but the
 “poison be spilt upon the ground by an accident: And albeit it be
 “commonly received, that, even in these cases, *affectus non est pu-*
 “*niendus sine effectu*, by the same punishment with the crime de-
 “signed; yet I would distinguish in this betwixt an effect disap-
 “pointed by an intervening accident, and that which is stopped by
 “the repentance of the committer; for where the design was only
 “disappointed,

“disappointed, I think the ordinary punishments should not be re-
 “mitted, in cases *ubi devenit ad actum proximum*.”

After what has been said, it will require few words to show, that he who attempts to corrupt, by offers, or promises, of money or rewards, is equally guilty, whether these offers or promises are accepted or not. He has done every thing upon his part to the completion of the crime; and he ought not to be allowed to avail himself of the virtue of those to whom the offers or promises were made.

The crime most similar to that which is the subject of the present prosecution, is the bribing of judges; and the same author who was last appealed to, lays it down as an established rule, That the attempt, *ubi pervenit ad actum proximum*, is equally punishable as if it had taken effect: “He also who corrupts the judges is punishable with
 “the punishment of falsehood, *Gloss. ad l. Qui explicandi, c. De accus.*
 “Which holds, though the judge accept not the bribe: he is pu-
 “nished if he endeavours; *pervenit ad actum proximum*; *Menoch. De*
 “*arb. cas. 343.*” *Mackenzie’s Criminals, lib. 1. tit. 25. § 3.*

The information for Mr Dempster, by Mr Solicitor, is as follows.

“The pannel stands accused and indicted, at the instance of the two prosecutors above named, for various acts of bribery said to have been actually committed, and others attempted to be committed, on occasion of the annual election of magistrates and counsellors in the borough of Cupar at Michaelmas last.

As this information respects some preliminary questions, we are not now at liberty to challenge the facts contained in the indictment. These must, *in hoc statu*, be taken for granted; but your Lordships know, that in arguing upon the relevancy of them, neither the truth nor the justice of them are understood to be acknowledged or admitted.

The different judicial steps which have taken place since the execution of the criminal letters, are set forth in the information on the part of the prosecutors; and therefore as it is unnecessary, it would be

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be improper, again minutely to recite them. There is only one particular observation in the course of the narrative, which, in justice to Mr Dempster, his counsel cannot allow to pass without animadversion. It is insinuated, That if he had been conscious of his innocence, he would have embraced the earliest opportunity of going to trial, and would not have retarded the speedy conclusion of it, by pleading his situation as a member of parliament.

But Mr Dempster is in the judgement of your Lordships, how far there is the smallest foundation for this observation. It was to the prosecutors a matter of absolute indifference, whether the trial, if at all to proceed, should go on in the month of December or March; and Mr Dempster never pled his character, as a member of parliament, farther than that he should not be obstructed in his attendance during the sitting of the session of parliament; but he was always willing, and voluntarily declared so the very first opportunity after his duty in parliament was over, to undergo the judgement of your Lordships upon the criminal letters with which he is charged. But so long as the session of parliament remained, he would have considered himself as acting a part unworthy of his seat, if he had allowed any great constitutional question relative to the privilege of parliament to be indirectly injured in his person.

The general argument which the counsel for the pannel maintained at the pleading upon the relevancy was, That this indictment could not pass to the knowledge of an assize, in respect, not only that the crimes charged were unknown in the common law of this country, upon which the indictment is laid, but likewise; that the interest upon which the prosecutors pretended to sue was such as the criminal law of this country did not acknowledge. It was further objected, That although bribery itself should be thought indictable at common law, still the whole of the indictment must fall to the ground, in so far as it charges bare and unsuccessful attempts to corrupt, which were not of such a nature as to be prosecutable in this supreme criminal court; especially at the instance of private prosecutors, who

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in no event could qualify the smallest injury or damage from those attempts.

It is proposed in this information, to bring the same points under the consideration of your Lordships, in the order above suggested; which, in the *first* place, leads to examine how far this crime is competent or known as a crime in the common law of Scotland.

In entering upon this argument, the counsel for the pannel feel themselves treading upon very delicate ground; for, as the minds of men are so much accustomed to view bribery in that obnoxious light which is suggested by the inexpediency and general prevalence of that practice, it is difficult to bring judges to consider the case independent of these ideas. But as they are conscious that your Lordships, in every criminal question, are capable to lay aside prepossessions of every kind, the argument shall be treated with freedom; and they hope, upon safe and sound principles, to maintain, that bribery is not punishable in the manner that is now demanded; nor does the good and well-being of the constitution, in any degree, require the aid of such prosecutions as this.

In general, it will be observed by your Lordships, that the indictment is not laid upon any statute whatever, but upon the laws of the realm in general: so that it is necessary for the prosecutors to point out those precedents or authorities by which they contend, that bribery is criminal at common law, independent of those particular statutes which have been enacted against it.

The definition of common law is a thing which we are at no loss to find out. It was described to us by the ancient civilians, to be that law which, although the origin of it cannot be traced, *moribus et consuetudine inductum est*; and the distinction betwixt *lex scripta*, meaning statutory law, and *lex non scripta*, meaning consuetudinary or common law, has been adopted by the writers in every age and nation ever since the time it was first given us by the Roman lawyers.

It would be endless to quote authorities in support of this definition; it is sufficient to refer to every author who has wrote upon law:

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law: And in particular, as the law of England boasts of having the boundaries betwixt their different species of laws nicely ascertained, if your Lordships would take the trouble to look into Blackstone's late Institutes of the law of England, you will there find, (Intro. § 3.), that through the whole, the *lex non scripta*, the consuetudinary or common law, are uniformly used as synonymous terms. In one place he condescends upon a variety of particulars in the law of England; and adds, p. 68. "All these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support."

Again, after making mention of some established maxims, and of a distinction which some would establish betwixt *customs* and *maxims*, he says, p. 68. "But I take these to be one and the same thing: for the authority of these maxims rests entirely upon general reception and usage; and the only method of proving that this or that maxim is a rule of the common law, is by showing, that it hath been always the custom to observe it."

And he concludes his observations upon the nature of the common law of England with this encomium: "Indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people."

Such being the genuine nature and import of common law, as uniformly defined by all lawyers, without one contradictory voice, so far as known to the pannel, it will be no difficult matter to apply the principle to the case in hand. It will be remembered by your Lordships, that both previous to the pleadings, and when the informations were ordered, it was recommended to the prosecutors and their counsel, to condescend upon a single example, where ever an action, such as the present, had been brought before this court: but after full time for an accurate search of the records and books of adjournal, no such example has as yet been produced; so that if the rule is just, That common law is nothing else but customary or

consuetudinary law, established by immemorial usage and long consent, nothing can be clearer, than that this indictment must fall to the ground, as being laid upon common law, and yet not one precedent adduced to support it. And this too is entirely agreeable to the rule laid down by the author already more than once quoted, who, upon the evidence of what is common law, says, p. 71. "Upon the whole, we may take it as a general rule, That the decisions of courts of justice are the evidence of what is Common law, in the same manner as in the Civil law, what the Emperor had once determined, was to serve as a guide for the future."

Against the principles hitherto maintained, it is argued on the part of the prosecutors, That if nothing was to be held common law, except what could be evidenced by custom and consuetude, there never could be any common law; because every consuetude must have a beginning: and the question is put, (See above, p. 421.), How came the first person who was tried for crimes not established by statute, to be condemned? and yet there have been many such condemnations.

But the answer to this is obvious: There are none such but what were understood to be clear violations of the law of nature, or of moral rectitude, such as incest, sodomy, &c. But where an action, in itself abstractly considered, is either indifferent, or unattended with the sensations of guilt, it requires either some positive law, or some established practice founded on expediency, to make it criminal.

And here the counsel for the prosecutors do not seem to attend to the material difference there is betwixt the early and more advanced periods of the law of a country. Crudeness and uncertainty is one of those many inconveniences which attend an unformed system of laws; and must, from necessity, be borne in the early proceedings of courts, while the law is defective and imperfect: but it ripens by degrees, either in the way of statute, or by custom; and repeated decisions of courts forming, in process of time, a fixed and a known rule, on which the subject relies for direction and security.

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What the experience of many past ages has found to be equitable, is probably the wisest and best-known part of our law. While this rule was forming, the subject did not feel himself secure. When the rule is formed, there can be no greater security.

In early ages, courts of justice were frequently groping for law, and the subject was uncertain where they were to find it, and how it might apply to his case. But it is obvious, that this is a state of society not to be imputed to the advanced period of our law; for the whole object of legislation has been to correct such a rude and defective policy, by introducing fixed rules and strict law, especially in all criminal and penal matters. When cases now happen unprovided for by statute or custom, it is the duty of judges to acknowledge the defect, that the legislature, if it thinks it expedient, may apply the remedy. Such questions, in the present improved state of our law, can only relate to matters of such moment as may well admit of all the delay which, from the frequent meeting of our legislative assembly, is necessary; and this much rather than strike a blow at the security of the subject by any sort of discretionary proceeding.

It is further argued for the prosecutors, That, independent of any custom or precedent, bribery is criminal at common law, on account of the immorality and evil tendency of it.

But the pannel must fairly confess, that this is a species of reasoning which he does not thoroughly comprehend. For, in the first place, with regard to the immorality of the act, the prosecutors should have been more accurate in ascertaining the principle upon which they would establish the turpitude and immorality of it, in an abstract view, and independent of that inexpediency which has weighed with the legislature to restrain it by such a variety of statutes. It may be safely acknowledged, that the giving or taking bribes in order to influence the opinion of judges is a mortal turpitude, because creative of injustice, which is prohibited by every rule of morality: but, in consistency with practices daily allowed without challenge or blame, the pannel must be forgiven to doubt, if

if the elector of a member of parliament is considered to act in a judicial capacity: for, if such was the case, it is impossible, that canvassing and solicitation could be at all tolerated; and yet they are publicly exercised; and far less could persons be at liberty to bestow their suffrages upon their own very nearest relations, which is the usual method of an elector giving his voice on occasion of an election.

But further, allowing bribery, on account of the inexpediency and destructive tendency of it, to be of an immoral nature, the panel would beg leave to ask, Where is the rule of law, which says, that every act, because immoral, or having an evil tendency, is therefore actionable before a criminal court? However specious such a proposition may appear to be, yet it may, with confidence, be said, that no proposition could be more destructive to the interests or security of mankind. Every subject is bound by the laws of his country, and is intitled to think himself secure while he does not offend against the law. But if the sense of morality, in prosecutors and judges, was to have the effect of law, so as to render actions criminal in a legal sense, the security of the subject is attacked, he holds it at discretion, and by a rule which he cannot know, "the opinion" "which others may form of his actions." In fact, conscience is the sole judge of immoralities; and therefore, if prosecutions in a criminal court were to be allowed, upon a charge of immorality, or evil tendency, without the authority either of statute or common law, the court of Justiciary would cease to be a court of law, and assume the characteristic of a court of conscience; than which nothing can be more inconsistent with the liberty and security of any free state. Conscience varies in different men; and no man can be bound by any conscience but his own, and that of the legislature, and established laws of his country.

Giving money to the electors of a magistracy with a view to promote any particular point, is by no means criminal in itself, considering it in an abstract view. It is a very innocent and harmless act; much more so than giving drink, which may end in debauchery,

ry, loss of time, and ruin of the morals. But as this practice of giving money may be attended with hurtful consequences to the particular constitution of our government, which in so far differs widely from that of France and some other countries; so the legislature has considered it as a political evil, and has, in certain cases, provided remedies against it. These very remedies show, that it was not considered as a crime at common law; for had it been an indictable offence, for which the person guilty might at any time have been brought to the bar of the criminal court, there would not have been occasion for any further remedy.

It was next pleaded in support of the competency of this crime, That the criminality of bribery was established by different statutes in several predicaments, which showed the sense of the legislature with regard to this practice in general; which sense was to be applied and extended to bribery, in every mode and every shape in which it should be made use of to influence an election.

We should live in a miserable and unhappy state indeed, if constructive crimes were in this manner to be established by artificial reasoning. There is no law, except either statutory or common law. With regard to the latter of these, the nature of it has been already explained; and as to statutory law, the crime is created, and owes its existence to statute; and therefore it is the statute only which can determine the extent of it; and it cannot be enlarged beyond the letter of the law by construction, argument, or arbitrary discretion of judges. It was under the authority of such positions as that maintained by the present prosecutors, that our forefathers of the last age underwent such grievous oppression. When a person was obnoxious, his condemnation was resolved upon; and the mode of carrying it into execution was devised, by the ingenuity of some able lawyer employed to make out the crime by constructive reasoning from some custom or statute; and when the words were defective, the arbitrary will of the judge supplied the defect.

Much might be said upon this subject; but rather than use words of his own, the pannel shall address himself to your Lordships in the concluding

concluding words of the famed Lord Strafford to the judges, who sat and condemned him upon constructive crimes. "Where has this species of guilt lain so long concealed? where has this fire been so long buried during so many centuries, that no smoke should appear, till it burst out at once to consume me and my children? Better it were to live under no law at all, and, by the maxims of cautious prudence, to conform ourselves the best we can to the arbitrary will of a master, than fancy we have a law on which we can rely, and find at last, that this law shall inflict a punishment precedent to the promulgation, and try us by maxims unheard of till the very moment of the prosecution. If I sail on the Thames, and split my vessel on an anchor, in case there be no buoy to give warning, the party shall pay me damages; but if the anchor be marked out, then is the striking on it at my own peril. Where is the mark set upon this crime? where is the token by which I should discover it? It has lain concealed under water, and no human prudence, no human innocence, could save me from the destruction with which I am at present threatened.

"It is now full 240 years since treasons were defined; and so long has it been since any man was touched to this extent upon this crime before myself. We have lived, my Lords, happily to ourselves at home, we have lived gloriously abroad to the world: let us be content with what our fathers have left us; let not our ambition carry us to be more learned than they were in these killing and destructive arts. Great wisdom it will be in your Lordships, and just providence for yourselves, for your posterities, for the whole kingdom, to cast from you into the fire these bloody and mysterious volumes of arbitrary and constructive treasons, as the primitive Christians did their books of curious arts, and betake yourselves to the plain letter of the statute, which tells you where the crime is, and points out to you the path by which you may avoid it."

But further, we do humbly apprehend, that in place of aiding the prosecutors cause, the various statutes which have been enacted against

against bribery, in certain particulars, do operate strongly in the scale of argument against it. When the legislature remains totally silent upon any species of action, it may be plausibly argued, that it does so, because leaving it to the dictates of common law; but where it does actually interpose, and does from time to time, by positive enactments, make enlargements to the crime, and additions to the penalty, it never can mean, that courts of law, without any precedent or custom to support their jurisdiction, should further interfere to make discretionary and unlimited extensions.

Accordingly, it will be observed, the legislature has provided remedies against every mode of the offence which it was thought necessary or material to guard against. If returning officers are corrupted, or do any wrong at elections, they are punishable. If any wrong is done at an annual election of magistracy and council, and particularly if it be brought about by bribery, the election is liable to be reduced. If bribes are given, or so much as asked, at the election of a delegate, or of the member, a statutory prosecution lies for penalties and disabilities. These remedies were thought sufficient by the legislature; and it does not occur, that judges have a power to extend them any further. Perhaps, if the evil grows more prevalent, new remedies may be introduced, and it may be made an indictable crime, to give money to the members of an incorporation at the annual election of magistrates: nay, it may be made a crime to drink with them, or so much as to speak to them: and this may be extended also to the election of deacons, to the admission of members into a corporation, and to every previous step of election. But all this must take its rise from positive enactment; and judges cannot, merely from their own notions of expediency, create political offences, and award arbitrary punishments against those guilty of them.

In criminal matters, the law ought to be fixed and ascertained, and nothing left to the arbitrary will of judges. Montesquieu, in treating of this subject, says, (b. 6. ch. 3.) "It was a fault in the republic of Sparta, for the Ephori to pass arbitrary judgements, without

“without having any laws to direct them.” And, to the praise of the criminal law of Rome, he observes, “That the judges had no more to do, than to declare, that the person accused was guilty of a particular crime, and then the punishment was found in the laws.” He adds, “In England, the jury determine whether the fact brought under their cognifance be proved or not: if it be proved, the judge pronounces the punishment inflicted by the law for such a particular fact; and for this he needs only open his eyes.” He would not surely have bestowed the same encomium upon the laws of Scotland, had he known, that a person might be indicted and tried at common law for a mere constructive offence, which is not declared punishable by any exprefs law, which is not founded on any ancient custom or practice, which is not noticed as a crime in any one law-book, and which is not a violation of any natural or universal law.

Upon this point, it shall be only further observed, that this constructive method of constituting a crime adopted by the prosecutors, is not only contrary to sound and safe principles, but it is likewise unsupported by any analogy from other cases. This has been illustrated by various examples.

The case of usury is an obvious one: for although various statutes have been enacted, in order to restrain the crime, and punish the usurer, was it ever heard of, that a person could be indicted in a criminal court for usury at common law, although the evil and destructive tendency of it to commerce cannot be called in question, and the criminality of it, in the language of the prosecutors, is established by different statutes?

The prosecutors are pleased to say, That the counsel for the pannel had misapprehended the law. But the misapprehension does not seem to be so accurately pointed out, that they are able to discover where in it consists. On the contrary, the pannel must be forgiven to say that he cannot discover the strength of the prosecutors argument when he quotes a statute as far back as the *Regiam Majestatem*, in order to prove, that usury was criminal at common law before the ad

of James VI. unless they could likewise prove, that James VI. lived before the *Regiam Majestatem*. But it is impossible to conceive how this matter can bear an argument: for no principle of the law of nature or morality could ever suggest to the mind of man the criminality of taking as much interest for the loan of his money as he possibly could; and even after the statutes have introduced restrictions, the argument for the pannel remains entire, that there is no example in practice, nor no authority of a lawyer in theory, to maintain, that usury is culpable or punishable at common law; and yet every argument used in the present case would equally apply to that. This, then, is one example to prove, that every thing made wrong by statute, does not therefore become criminal at common law.

Smuggling is an example of a similar nature; which, though punished by various penalties, yet no prosecutor ever thought of bringing any of that pernicious race to stand trial at common law, although the hurtful consequences of it to every vital part of the constitution cannot be called in question. The prosecutors say, there is nothing stands in the way of a criminal prosecution on account of smuggling; for it is a species of theft, by which the crown is defrauded. But the pannel cannot subscribe to that doctrine. Theft has a definite idea in law; and if it were to be extended in the loose illogical manner suggested, every species of fraud is a theft upon the same principle, and might be criminally prosecuted. But, without dwelling longer upon the argument, it is clear, that the prosecutors position, that smuggling may be criminally prosecuted independent of the statutes, is a mere *petitio principii*, against which the pannel opposes the fact, that, notwithstanding the eagerness of all good ministers and magistrates to suppress the fraudulent practices against the revenue, yet no such prosecution at common law appears ever to have been brought either in this or our neighbouring country; which is at least pretty strong negative evidence of the sense of lawyers in both countries.

The pannel, not to trouble your Lordships more than necessary, shall only add one example more. Gaming is a striking one: no body will read the statute-book, and doubt of the culpable and criminal light in which it has always appeared to the legislature. But it is left with your Lordships without argument, to determine in what light an indictment at common law, charging a person with losing more money than he ought to have done, would be received in this court.

The prosecutors next endeavour to support the indictment at common law, by alledging, that the Roman law is the common law of Scotland; and as bribery was punished among the Romans by the *lex Julia de ambitu*, so in like manner it must be a crime at common law amongst us.

But this, with submission, is perfectly absurd. It was not even a crime among the Romans till made so by express statute; and upon looking into the account of that crime among them, as given by Matthæus, your Lordships will observe, that even amongst the Romans, this practice was looked upon in different lights, according to the change of their manners and modes of government they underwent. It is however unnecessary to enter more minutely into that discussion: for although, in some of our old statutes, the Roman law is vaguely termed our common law, it is out of all sight to apply that to criminal matters. This at most can only hold in matters of civil jurisprudence. It may be proper to resort to its maxims, as to contracts, obligations, and such like, which must be governed by the same principles in all countries; but it would be ridiculous to adopt its crimes and punishments; for these must be different in different countries, according to their several constitutions, climates, and other circumstances: and hence it is, that some things are criminal in one country, which in another are not only innocent, but laudable and praise-worthy*.

* Here it might have been observed, that Sir George Mackenzie concludes his *Criminals* with observations upon "some crimes punished among the Romans which are not directly in use with us;" and the first he takes notice of is the *lex Julia ambitus*.

Another argument in support of the competency of this crime at common law, is founded upon the preamble of the act of George II. which says, "That the laws already in being have not been sufficient to prevent corrupt and illegal practices in the election of members to serve in parliament." From which words it is argued, that the legislature must have understood it to be an offence even previous to the enactment of this statute.

Various answers occur. In the *first* place, This statute relates to England as well as to Scotland: and the pannel knows not but there may have been criminal statutes in that country against bribery, previous to the 2d of George II.

2dly, The general words in the preamble of the statute would most properly be explained, by supposing they referred to civil remedies, competent either to the houses of parliament or courts of law, for rectifying the different wrongs that might be committed at elections, to supply the deficiency of which the criminal enactments, in such a variety of particulars, were introduced by this act of the legislature.

3dly, If no other answer could have been made, it would certainly have been sufficient to say, that the vague or general preamble of a statute could never establish the existence either of statute or common law, if in fact, upon inquiry, it appears, that either the one or the other did not exist.

Lastly, The pannel does with much more reason plead, that the preamble of this statutes proves, that no such action as that now attempted was understood to exist: for if the legislature had thought, that, for every act of bribery of any kind, or even attempt to corrupt, it was competent to bring the offender to the bar of the supreme criminal court, concluding for the pains of law, *i. e.* for such arbitrary punishment, by fine, pillory, or imprisonment, as judges should please to inflict, it would never have declared, that such a remedy was not adequate to every one of the corrupt and illegal practices mentioned in the statute.

At the pleading upon the relevancy, the prosecutors were pleased to

to refer much to the law of England in support of this part of their plea. These references were only general, without resorting to authority or precedent; and therefore it was recommended to the counsel by your Lordships, to be more particular in condescending upon the arguments they drew from the law of England. If this request had been complied with, and they had been able to support their argument by the most pointed authorities from that law, still the pannel would have strenuously contended before your Lordships, that it would not have varied the case, because he is intitled to be tried by the laws of his own country; and although a variety of precedents or decisions of the courts of law would have instructed bribery to be criminal by the common law of England, still it would not prove it to have been criminal by the law of Scotland, where no such proof of consuetudinary law has or can be produced.

But it is unnecessary to say any more upon that head, because no such proof has been produced even from the law of England; and the assertion seems to be dropped out of the information for the prosecutors.

The pannel shall conclude his observations upon this part of the argument, with taking notice, that if the competency of trying every species of this kind, by a general charge at common law, were to be sustained, it would lead into this manifest absurdity, that a person guilty of a lesser species of bribery, at any previous steps of election, would be in a worse situation, than he who had been guilty to the utmost extent of the crime, by bribing either the delegate or immediate electors of a member of parliament. For in the cases last mentioned, the law has not only given an absolute *quietus* to offenders, who, in twelve months after the election, shall discover any other offenders; but it has specially ordained, that no person shall be liable to any penalty upon the 2d of George II. unless the prosecution is commenced within two years after the penalty is incurred; whereas no such defence or limitation could be beneficial to him, even in a lesser species of bribery, if it is competent to try him for the same at common law, as is now contended on the part of the prosecutors.

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This last observation does, with submission, of itself demonstrate, that the legislature did not consider any other action to be competent, either for those greatest, or for any other lesser species of bribery; for these special enactments, either of a total absolvitor in the case of a discovery, or of a limitation of the action under the statute, would have been totally absurd, if it had considered a prosecutor at liberty to bring an action charging the offence at common law, which does not admit any such defence, which is arbitrary in its punishment as the will of the judge shall suggest, and is not limited by any period of endurance whatever.

The prosecutors seem to be conscious of their inability to support this indictment at common law; and therefore are at pains to persuade your Lordships, that it may be supported as an indictment laid upon the statute; because the statutes are part of the laws of the realm, and the indictment charges the facts alledged to have been committed against the laws of the realm.

But if such arguments as this are to be listened to, there is an end of all certainty and regularity in criminal procedure. It is of the utmost importance, that criminal libels should be accurately and precisely framed, and that the pannel should know with certainty upon what law he is accused; more especially, where the act laid to his charge is not a violation of morality, or of the law of nature, but of that kind which requires positive law to make it criminal. For example, supposing it should be charged, that, by the law of this, as well as of other well-governed realms, it is highly criminal for soldiers to remain in a borough, or within so many miles of it, at the time of the elections of said borough; or that it is highly criminal to buy up meal coming to a market-town within so many miles of said town; surely a libel of this kind would not be sustained; because, at common law, and according to the natural feelings of mankind, there is nothing which renders any of these actions criminal; the criminality of them can only consist in their being done *spreta auctoritate* of some express enactment of the legislature, founded upon reasons of expediency: and in order that it may appear whether

whether the fact charged does really come under the description of the statutory crime or not, the statute must be expressly set forth, and libelled on. Another instance may be given in this very case of bribery, viz. that, by a particular statute, the asking a bribe is, in the particular instances mentioned in the statute, rendered criminal, and may be the foundation of a prosecution concluding for certain penalties upon that statute. Now, suppose the statute was to be overlooked, and a criminal libel brought, charging the fact of asking bribes as a high crime, severely punishable, &c. it is, with submission, thought, that such libel would not be sustained: for it is only in particular cases that the asking bribes is made criminal even by statute; and it is certainly no crime punishable at common law. The pannel is intitled to insist in such cases, that the law be specifically set forth, in order that he may come prepared to show, that he does not fall within the law. But if the prosecutors argument were to be admitted, a pannel might be convicted upon an indictment, charging an infringement of the laws in general, and not know, till after his conviction, either the statute upon which he was tried, or the penalty he was to incur.

It is too late to maintain such doctrines as this. Even so far back as the days of Sir George Mackenzie, when the forms of criminal procedure were not much advanced in point of accuracy and precision, he gives it as his opinion, (b. 2. tit. 21.), that indictments ought regularly to express the particular acts upon which the proposition is founded: and it is believed, that for these very many years past, an example will not be found where the enactments of a statute have been applied in the case of a conviction upon an indictment where the statute has not been libelled.

Not long ago, your Lordships had occasion to canvass this very argument in the case of Gabriel Hallyday, indicted for perjury at the instance of Bailie Rob, one of the magistrates of Wester Anstruther. In that case, the indictment was laid, both at common law, and upon the act 19. parl. 5. of Queen Mary against bigamy; which act only contains an implied declaration of what were understood to be the

the pains of perjury at that time. The act which ought to have been libelled, was the posterior statute, the 47th act, parl. 6. of Queen Mary, expressly relative to that particular perjury committed by a witness upon oath. Your Lordships considered this as a very fatal objection to the indictment; but it never entered into your minds, that, under the general charge, of perjury being against the laws of the realm, you were at liberty to ransack the statute-book, in order to find a statute and a punishment not contained in the libel.

It is said in the information for the prosecutors, (p. 420.) "That many acts of parliament have passed with regard to the crime of theft; but few or no indictments are to be met with that libel any of these acts. It is sufficient that they mention the act of theft to be a crime by the laws of the realm in general." But in this argument the prosecutors do not advert, that theft is a crime by the common law of Scotland; and therefore the indictment is properly laid upon the laws of the realm in general; and therefore the prosecutors observation totally claudicates, unless they could point out an example, where a statute has appointed a particular punishment to any particular species of theft, and that, notwithstanding the statute not being libelled upon, your Lordships had nevertheless found, that the general charge, of the offence being against the laws of the realm, was sufficient notification to a pannel to come prepared against every law which, upon after investigation, might be found in the statute-book.

Thus the pannel has endeavoured to bring under the view of your Lordships those grounds in law from which he apprehends himself intitled to conclude, that the crimes charged in the indictment are unknown in the common law of this country, upon which only the indictment is laid; and this was the first general proposition he proposed to maintain. He now proceeds to the *second* and separate ground of defence; namely, That the interest upon which the prosecutors pretended to sue, was such as the criminal law of this country did not acknowledge.

There is perhaps no particular in which the criminal jurisprudence of ancient and modern times differ more widely than in their manner of instituting criminal suits. Popular actions were the great favourites of Rome and other ancient states; and indeed the notion of every person being equally interested and intitled to vindicate public wrongs, corresponds very aptly with that equality, virtue, and purity of manners, which were the distinguished characteristics of the ancient republics in the earlier periods of their government.

But however consonant such an institution might be to the pure and upright manners of an early period, it is obvious to the smallest reflection, that it could not fail of proving highly incommodious in proportion as the ancient simplicity of manners decreased, and depravity and corruption gained ground in the state.

The consequence naturally to be expected did accordingly happen. Prosecutors, in place of being actuated by virtue, and the love of the republic, made use of that privilege which the law allowed them in order to give vent to their own implacable fury and revenge.

The law was obliged to interpose in order to remedy the evil. At first an oath of calumny was invented: but this check was very far from restraining the evil; it grew to so enormous a height, that the Romans were obliged to impose a severer check, by obliging the prosecutor to submit himself to a similar punishment, in case he failed in his prosecution. Voet (*tit. De accus. et inscript. § 13.*) gives an account of this progress of their law in the following words: "Ne
" autem temere quis per accusationem in alieni capitis discrimen ir-
" ruerit, neve impunita esset in criminalibus mentiendi atque ca-
" lumniandi licentia, loco jurisjurandi calumniæ adinventæ fuit in
" crimen subscriptio, cujus vinculo cavet quisque, quod crimen ob-
" jecturus sit, et in ejus accusatione usque ad sententiam perseveratu-
" rus, dato eum in finem fidejussore. Simulque ad talionem seu
" similitudinem supplicii sese obstringit, si in probatione defecisse,
" et calumniatus esse, deprehensus fuerit."

There can be little doubt, that if the Roman law had continued long to flourish, there must have been some other alteration in this matter:

matter : for, as a late author observes, it was indeed a complete bar to false accusations, being in effect a prohibition of prosecutions at the instance of private persons ; for what man would venture his life and fortune, in bringing to punishment a criminal who had done him no injury, however beneficial it may be to the state to have the criminal destroyed ? This would be an exertion of public spirit scarce to be expected among the most virtuous people, not to talk of times of universal corruption and depravity.

Another consequence of this ancient mode of instituting criminal prosecutions, was the introduction of an infamous and malicious set of informers, who flattered the vices of their princes at the expence of the lives and fortunes of their fellow-citizens. It will not be unacceptable to your Lordships, to hear, upon this subject, the sentiments of the great author of the Spirit of Laws, (b. 6. tit. 8.), and the preference he gives to modern institution. “ In Rome, it “ was lawful for one citizen to accuse another : this was according “ to the spirit of the republic, where each citizen ought to have an “ unlimited zeal for the public good, and where each citizen is supposed to hold the whole rights of his country in his hands. Under the emperors, the republican maxims were still pursued ; and “ instantly a pernicious set of men started up, a whole swarm of informers ; whosoever had numerous vices and abilities, a mean soul, “ and an ambitious spirit, busied himself in the search of some criminal, whose condemnation might be agreeable to the prince. “ This was the road to honour and fortune ; but luckily we are “ strangers to it in our country.

“ We have at present an admirable law, namely, that which requires, that the prince, who is established for the execution of the “ laws, should appoint an officer in each court of judicature, to prosecute all sorts of crimes in his name. By this means the profession of informers is a thing unknown to us ; for if this public avenger were suspected to abuse his office, he would soon be obliged to name his author.

“ By Plato’s laws (lib. 9.), those who neglect to inform or to assist the
 “ magistrates, are liable to be punished. This would not be so proper
 “ in our days. The public prosecutor watches for the safety of the
 “ citizens ; he proceeds in his office, while they enjoy the sweets of
 “ tranquillity.”

No wonder that modern states, warned by such striking examples, have been instructed to assume a different mode of prosecution. In most countries, a *calumniator publicus*, such as mentioned by President Montesquieu, is appointed, who acts at his peril in the execution of criminal law. This in particular is the case in this country ; with this exception only, that those having a *legal* interest are intitled to pursue in their own name, with the concurrence of his Majesty’s Advocate. In England, a check of peculiar utility prevails : for if it is a misdemeanor prosecuted by information, it must be prosecuted, if the pannel is not misinformed, either by the attorney-general *ex officio*, or upon leave of the court to file the information ; if it is an offence triable only by indictment, it is necessary that the approbation of the grand jury must precede the trial : so that in whatever shape the prosecution is instituted, the laws of England have wisely provided such checks as effectually prevent prosecutions at the instance either of vindictive prosecutors or malicious informers.

Taking it for granted, therefore, that, instructed by the experience of former ages, popular actions are the odium and abhorrence of modern times, and peculiarly so of this country, the pannel shall proceed to consider the interest condescended upon by the present prosecutors ; and if he shall be so happy as to convince your Lordships, that the doctrines maintained by them go so far as to countenance popular actions of the most dangerous nature, he rests satisfied you will not think proper to introduce so pernicious an innovation into the criminal law of this country. The pannel has already admitted the exception in the law, whereby private prosecutors having a legal interest, are allowed to pursue ; and therefore the question to be considered is, Whether the prosecutors have produced a-

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ny interest which can be sustained, either upon principles or precedents, in the criminal records of this country?

The interest of the prosecutors is somewhat different; and therefore falls to be differently considered. Mr Geddie says, That he was a magistrate at the time the bribery libelled was committed, or attempted to be committed; and therefore is intitled to sue an action brought for the purpose of punishing a crime committed within the borough, and so destructive of the purity and chastity of its morals.

Now, your Lordships will consider how far this argument will go, and will then determine whether it does or does not tend to the introduction of popular actions.

Destructive as the tendency of bribery may be, it will not be said that it is more, or even equally, enormous with a multitude of other crimes that can be mentioned. Murder, adultery, theft, and the pannel will beg leave to add drunkenness to the catalogue, are all of them equally destructive of the chastity and purity of the morals of the borough, and equally repugnant to the well-being of its constitution; and therefore the first conclusion flowing from the prosecutors doctrine is, That every magistrate and counsellor of every royal borough in Scotland, is intitled to assume the character of *calumniator publicus* in every crime committed within or concerned in the well-being of the borough.

But this is not all: the powers and jurisdiction of the justice of peace in counties is cumulative with that of the magistrates and counsellors in the boroughs within their county; and therefore they, no doubt, by the same rule, would have the same power of prosecution as either the magistrates or counsellors.

And the matter does not stop here; for the justices of peace would likewise be intitled to the same power with regard to every crime committed within their respective counties: so that really, if a latitude in this matter is to be allowed, there is no defining how far the prosecutors principle would carry us. If vague and indefinite interests are to be admitted, every individual of the kingdom may say,

say, he is liable to be taxed, and subject to the laws of the realm, and may therefore lay claim to his title of pursuing a crime so immediately tending to affect the purity of representation in parliament.

Many other observations might be offered to show the danger of departing from the rule of law, whereby every person is allowed to have a legal interest in those crimes which affect his *person, character, and goods*. Some likewise add *family*: which perhaps is unnecessary; because, although one is likewise allowed to vindicate the injuries done to those with whom he is immediately connected in family; yet a man's family is, with no great impropriety, considered as a part of his personal estate; and therefore falls under that interest allowed to every man to vindicate the injuries criminally offered to his own person.

The pannel has been at pains to make the search, and is not able to find an example, where the rule of law, limiting a criminal interest in the manner now suggested, has ever been departed from, so as to allow any person to vindicate, in a criminal action, any injury, except what has been committed against his character, goods, family, or person: and when there is so clear and rational a principle and rule by which to judge, it is not imagined your Lordships will be inclined to depart from it; for otherwise, such a multitude of vague interests will be condescended upon, you will find yourselves engaged in a labyrinth of wildness and uncertainty, without any one rule by which to extricate your judgement.

The prosecutors, at the pleading, condescended upon various examples, which they said were deviations from this rule. But all of these fell so clearly under it, that they are now dropped out of their information; and one only remains, viz. the case of Mr Lockhart of Lee against the rioters of Lanerk. But this might have been omitted as well as the rest; for the smallest attention will prove it to fall directly within the rule. The case there was, that the settlement of Mr Lockhart's presentee to the kirk of Lanerk, was obstructed by the rioters afterwards brought to trial; unless therefore the prosecutors

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cutors can maintain, directly in the face of law, that a right of patronage is not a right of property, it is impossible to maintain, that a riot, obstructing the settlement of his presentee, did not affect Mr Lockhart in his goods or property.

A case is put, supposing that the Michaelmas election of magistrates and counsellors had been overawed by force, so as that the pannel had gained a majority; and the question is put, Whether, in such a case, a criminal action would not have been competent at the instance of the chief magistrate of the borough?

The answer to this question depends entirely upon the circumstances of the force. If one or two individuals had been privately withheld from the meeting by force, whatever civil action might have been competent to any member of council to remedy the wrong, the pannel does deny the competency of any criminal action for the forcible detention, at the instance of any but the person himself who was detained; and the same with regard to the case of the bribery of individuals, except in the case where the popular action is given under the statute. But, on the other hand, if the force was exercised in a riotous and tumultuous manner against the meeting of the council in general, then, no doubt, a criminal prosecution might have been sustained at the instance of any of the individuals, because directed against each of them personally. However, even in this case, it would be more regular to have the action brought at the instance of the public prosecutor.

So much with regard to the interest of Geddie; the general principles of which do no doubt likewise apply to the interest claimed by Mr Macintosh, who claims a title to pursue, both as a counsellor elected at last Michaelmas, and as a candidate for the office of provost and member of parliament.

With regard to his character as counsellor elected at last Michaelmas, the same observations apply to it as to Mr Geddie; with this addition, That his interest in that respect is rather weaker, in so far as he was not a counsellor at the time the bribery is said to have been committed within the borough; and therefore can have no more

more title, in the view of preserving the morals of the borough, to pursue this bribery, than any other crime which may have been committed any given number of years past.

In so far as Mr Macintosh claims a title on account of his candidship, either for provost or member of parliament, the pannel does likewise deny, that this is an interest which the law can acknowledge. It may be true, that now-a-days such offices are sought after with the most eager attention; but it is likewise true, that in the idea of law, they are considered, not as rights or privileges, but, on the contrary, as burdens or services, which men are compelled to undertake: it would therefore be somewhat absurd, if a person was allowed to pursue criminally, because he was prevented from undertaking an office which the law considered as a burden.

As your Lordships will rather chuse, in this, and in every other question, to be guided by clear and unalterable rules of law, than to be left at arbitrary discretion, without any rule to direct your steps, the rule in this case is patent, if your Lordships think proper to adopt it. The only ground upon which a person claims a right to pursue criminally, is because he is hurt. Now, it is impossible, that, in a legal sense, any person can be hurt or injured, without having it in his power to sue for reparation of that injury.

Accordingly, if your Lordships will attend to every case, where the interest of a private prosecutor is admitted, so as to pursue criminally, the same interest would warrant him to pursue reparation before a civil court. In the case of murder, there is the action of assythment; in the case of a rape, an action *in solatium* and for damages is likewise competent; in theft, the action for restitution is undoubted; and so upon examination will be found to hold with regard to other cases.

Here then is a clear and invariable rule of law, by which this matter may be at all times easily explicated, and the boundaries properly defined betwixt the rule of law, That there should be no popular actions, and the exception from that rule, That every person having a legal interest is intitled to pursue.

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By this rule, then, let the present question be tried; and the pannel begs leave to ask, Whether Mr Macintosh would be allowed to pursue a civil action for reparation of damages, because he had been disappointed in his election either as provost or member of parliament? He certainly would not. This was one of the questions stated to English counsel in the question betwixt Sir John Gordon and Colonel Scot; and the answer of Sir John's own counsel was, That he never knew such an action, and did not believe it would lie.

It is, however, unnecessary to dwell longer upon this argument; for it is in a manner admitted on the part of the prosecutors, that Mr Macintosh's interest as a candidate would not give him a legal interest to pursue this action: for, in answer to the argument which the pannel drew from the case of Sir John Gordon, desiring to compel his Majesty's Advocate to prosecute Colonel Scot at his own instance, because he was advised he had no interest to pursue in his own name, the prosecutor says, (see Inform. p. 429.), "That Sir John Gordon was no magistrate or counsellor, but *quilibet e populo*, having no title; and therefore had no other method left but "by applying to the public prosecutor to take up the cudgels for the "public interest." Sir John Gordon was a candidate full as seriously as Mr Macintosh; and therefore, if his character, as a declared candidate against Colonel Scot, did not give him a title to pursue, it does not occur upon what principle the interest of Mr Macintosh can be one bit stronger in opposition to Mr Dempster.

The prosecutors are at pains to enlarge upon the bad consequences which they suppose will follow, if the crime of bribery was not allowed to be prosecuted at the instance of such pursuers as they; and it is said, that no such prosecution would ever be brought, unless at the instance of those particularly hurt by it.

But the pannel must be forgiven to object to this doctrine in all its parts. For, in the *first* place, He does humbly deny, that there is any necessity for such actions as this, in order to curb bribery, in so far as it is in any one degree prejudicial to the freedom of elections.

The election itself, in so far as corrupted, is remediable by the civil action well known to your Lordships; and in fact this very election for the town of Cupar made at Michaelmas last is at present in dependence for reduction before the court of session, and almost the same witnesses examined in the one that have been cited in the other. Besides this civil action known in law for the reduction of the election, the statute 2d George II. has given a criminal action for high penalties where it thought a criminal action was proper or expedient; and therefore it really does not occur, even what reason there is to wish for more actions relative to bribery than what the law has already introduced. But,

2dly, If your Lordships will have this action at common law likewise introduced, the pannel can see no reason why, more than any other public crime, it may not be left to the cool and dispassionate attention of the public prosecutor. In theory, perhaps, it may have a very singular appearance, that so much power should be vested in any one man, or that the Advocate of Scotland should be upon a footing with the grand jury of England: but experience is the surest test to resort to; and if the pannel is rightly informed, an example will scarce be produced, where, since the criminal law of this country was established upon a regular footing, that officer of the law was suspected of abusing his trust, by relaxing where severity was proper, or by rigorous measures where measures of a contrary kind would have been more proper. And the pannel shall further observe, that if on any occasion he should appear more remiss than he ought to be, your Lordships would have, as usual in many cases, an opportunity of reminding him of his duty, as most of those bribery-questions come before you in another character.

But since the prosecutors have indulged themselves with pointing out imaginary consequences if their title should not be sustained, the pannel will be forgiven to take notice of most real and certain consequences in case it shall be sustained.

It is needless minutely to tell your Lordships of that plentiful crop of litigation which ensues in the civil court on occasion of every disputed

puted election for a member of parliament; you know it well to your sad experience. But what will be the result, if this new door for litigation is opened, it is impossible for any person to foretell. It needs but a beginning to make it fashionable; and as it seems to be a maxim now fully established in the political practice of this country, that no election must be lost without the candidate doing honour to himself and his party by two or three law-suits in the civil courts; so, if your Lordships shall go on to establish, in the *first* place, That every species of bribery, and in every degree, is prosecutable as a crime at common law; and, in the *second* place, That it can be pursued at the instance of any person who may conceive himself to be injured; it is obvious, that the animosity and keenness of political contests will soon be as productive of criminal prosecutions as they now are of civil questions; the honour of the party will become as much interested to go through with the one, as it now is to carry on the other.

And here your Lordships will not fail to observe how wide the field is. It is not money alone which law considers as a bribe, but every office, gratuity, promise, or even hint of gratuity, are all culpable in the eye of law; so that when every circumstance which may occur on occasion of a warm contested election is aggravated and augmented by party-rage and political resentment, it is left with your Lordships to judge what a field must inevitably open in every borough and county of the kingdom. The pannel avoids to mention the train of falsehood and perjuries which must necessarily ensue; these are too obvious to require particular notice.

The prosecutors say, That all these consequences will be sufficiently guarded against by the concurrence of his Majesty's Advocate, which will not be given to authorise malicious prosecutions. But your Lordships know, that this answer is a mere farce, when you attend to the manner in which the concurrence of his Majesty's Advocate is given. The concurrence makes the title neither better nor worse; and therefore is given as a matter of course. It has even been doubted how far his Majesty's Advocate is at liberty to refuse it. Certain it

is, that when Sir Thomas Hope, his Majesty's Advocate, refused to subscribe two bills of improbation, the court of session compelled him to do so; and, by an act of federunt, bearing date in January 1633, it made a general order concerning the duty of his Majesty's Advocate in all similar cases. But whether he is or is not at liberty to refuse, it will in no shape vary the argument; for if the title and interest of such prosecutors as the present is once sustained, no Advocate will ever take it upon him to refuse it to any person, who, in the height of political phrenzy, can in no event be difficulted to support his demand by bold averment.

In the *last* place, It was objected on the part of the pannel, That although bribery itself should be thought indictable at common law, still the whole of the indictment must fall to the ground, in so far as it charges bare and unsuccessful attempts to corrupt, which are not of such a nature as to be prosecutable in this supreme criminal court, especially at the instance of private prosecutors, who in no event could qualify the smallest injury or damage from those attempts.

If the pannel has been successful in satisfying your Lordships, that bribery itself is not a crime at common law, there is an end of this part of the question. But even although bribery itself were actually punishable both at common law and by statute, the pannel does humbly dispute, that an attempt to gain a vote by money, or the promise of money, is punishable as a crime. Bribery is not an idea known in the law of nature, or the general rules of morality; and therefore, being statutory and municipal, it is the statute must determine how far it is necessary it should proceed before it is to be viewed as partaking of a criminal nature.

Now, when the statutes respecting this subject are looked into, your Lordships will observe, that an attempt to bribe is never stigmatized as criminal, unless the corruption has actually taken effect; and therefore, although the prosecutors were even to prevail in their constructive reasoning, that every degree of bribery was to be esteemed criminal, because the criminality of bribery in general was established by statute, still even that argument would not carry them
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through in this part of their indictment; for the criminality of an attempt to bribe is established by no statute.

Nor will the authorities resorted to by the prosecutors avail them; for, by their own showing, authors are not at one upon the point: And even as to those cases where they do consider an attempt towards a crime to be in itself criminal, the very attempt in those cases does carry along with it a distinct species of crime; for example, although an attempt to poison or to assassinate a man does not amount to the crime of murder, still it is punishable of itself; because it is criminal to bring any of his Majesty's lieges into a terror for their lives. The same observation and reasoning will apply to most other cases where attempts to commit crimes are considered as punishable.

But further, although it should be thought, that both bribery, and attempts to bribe, are criminal, still the prosecutors do not advert to the additional, and, with submission, unanswerable objection, that would lie to their title of pursuing upon this part of the indictment. A private prosecutor must surely have suffered a hurt of some kind or another before he can complain: but the pannel cannot possibly discover where is the hurt sustained by these prosecutors, when, by the showing of their own libel, the attempts to hurt them were totally unsuccessful. If your Lordships shall be of opinion, contrary to the expectations of the pannel, both that bribery, and attempts to bribe, were crimes at common law, prosecutable at the instance of the public prosecutor, and likewise that bribery actually committed was prosecutable at the instance of a private pursuer who has been hurt, still, how attempts can be prosecuted at the instance of a private pursuer who confessedly is not hurt, is to the pannel incomprehensible.

Upon the whole, the pannel, with chearfulness, submits himself to the judgement of your Lordships, and rests satisfied you will be of opinion, *first*, That the crime as laid is not competent; *secondly*, That although it were competent, it is not actionable in a criminal court at the instance of these prosecutors; and, *lastly*, That, in all events, that part of the indictment which charges only bare and unsuccessful

cessful attempts to corrupt, is totally irrelevant, and falls to be dismissed."

These informations were advised by the court on the 1st of August. A note was taken of the opinions; but it is not full or accurate; however, it will give some idea of the grounds of the decision.

O P I N I O N S.

AUCHINLECK. But lately that bribery was heard of in this country; which for its honour. It is subversive of the constitution, and makes people bound by an oath depart from it; therefore clear that it is a crime, and indictable at common law: but as it is a consequence of this, that persons may be brought to trial for it at a great distance of time, judges bound to take care, that the charge be strictly formal and regular, that the prosecutors have a proper interest. The statutes against bribery give a popular action; but the common law permits those only to sue, who can show they have been hurt. In several articles, the charge only bears, That Mr Dempster had corrupted, or attempted to corrupt, such and such persons, without stating any particulars; so that the pannel cannot be prepared to disprove; and therefore the charge so far too general, and cannot be remitted to a jury. As to Sibbald, &c. neither the place where, nor the manner how, the corruption took place, mentioned; but only gifts and promises in general; so that the pannel cannot bring exculpatory evidence, or prove *alibi*: nor can it be known whether the facts would be relevant, as the mode of corruption not set forth. That part of the charge respecting Thomson, Smith, and Morris, is strongest. Supposing the prosecution to have been at the instance of the King's Advocate, the question must have been, How far these people accepted of the offers, or agreed to be corrupted? The putting money into Morris's pocket does not imply, that he was corrupted; and he is not alledged to have been so. Had the Advocate prosecuted, he must have proved, that corruption actually ensued;

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sued: but not so much as here charged, that any of these persons were actually corrupted, and voted against Mr Macintosh. He has no title to be a public prosecutor, excepting he were suing upon the statute: must be able to say he has been hurt; but that he does not: therefore the first part of the charge too general; and the last, which is special enough, shews he has no interest. Clear then for dismissing it.

ALEMOOR. Of the opinion given. Bribery is one of several ways of depriving an elector of his freedom. Clear that it is indictable at common law. Crimes divided into public and private. The first species, such as sedition, bribery, &c. affect the constitution more immediately than they do individuals; and therefore clearly may be prosecuted by the King's Advocate. As to private crimes, damage suffered intitles a private party to sue. None of the prosecutors have suffered any in their persons, estates, or characters. Won't go so far as to say, that keeping a man out of parliament affect none of these; won't go upon the old notion, that attendance in parliament is a burden; but such loss cannot be estimated at a precise sum, though action may be competent in certain cases: however, will leave this point of interest till the circumstances of the charge are considered. It is a general accusation, as lax as any ever exhibited. 'Tis a sacred rule of law, That the facts must be laid with precision in a criminal charge; not allowable to charge, You killed such a man, by stabbing, poisoning, &c. Here the mode of corruption not specified; and yet there is so many modes of expression in soliciting, which are not criminal, that no proof ought to be allowed upon a general charge; and the prosecutors the less excusable for not stating the modes of corruption, as they might have found them out upon a precognition. When the charge is not special, the court cannot judge of the relevancy, nor the pannel prove a defence. As to the second branch of the charge, that shews the prosecutors thought it was incumbent on them to be special. Doubts if an attempt to bribe be actionable, when carried so little way as not to be accepted. No acceptance here. Does not mean that it
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is necessary that the corrupt bargain should be executed by voting in terms of it, but it must be completed by acceptance. Attempts may be punished, when a violence or breach of the peace committed; but no such thing could occur here. The persons attempted have voted for the prosecutors; had they done otherwise, it would have been charged: so the prosecutors have no interest, not having been kept out of parliament or magistracy by these offers. Therefore, as the King's Advocate is not prosecutor, for finding, That this libel ought not to go to a jury.

KAMES. Bribery a crime at common law. Had Geddie been turned out, thinks he would have had an interest. No occasion to enter on the point of interest, which is intricate. Never saw an indictment with more words and less matter. Though action might be competent to the King's Advocate, not to these private prosecutors.

PITFOUR. Bribery indictable at common law. The statutes against it did not mean to supersede the common law. Action not limited to the King's Advocate, but competent to every party that has interest. Libel faulty, in so far as it does not mention the place. No fair witness can be mistaken as to that, though he may as to the time; therefore greater latitude allowed as to this last. In many articles of the charge, evident the proof to be by one witness only; and won't say, but in a generic crime, one witness to each act may be sufficient; but then the court must be careful, that the pannel be forewarned to bring his exculpatory proof. First articles of the charge too general to go to a jury. As to the rest, won't say no action lies for bribery, though it had no effect; sufficient that a corrupt bargain was entered into; but that not alledged in this case. For dismissing the libel.

COALSTON. Bribery a crime at common law. Doubts the prosecutors have no interest, having suffered no damage in their persons, property, or character; and that a civil action would not lie on account of the wrongs alledged. Clear that it is not competent to them to prosecute for unsuccessful attempts, though it might be

so to the King's Advocate. The last acts charged not mere *conatus*, as the alledged briber did all he could to corrupt. Does not say the five last articles are not relevant, but that these private parties have no interest to sue on account of them. No instance in the records of a libel sustained that did not mention the place; and such libel never should, as it precludes the defence of *alibi*. A libel for murder like this would be cast on the head of uncertainty. In a late case, (Sir Alexander Grant's), the court of session admitted a libel like this to proof; but in civil cases a precognition cannot be taken; and in civil actions, it is in the defender's power to bring witnesses *quandocunque*, but here the diets are peremptory.

JUSTICE-CLERK. Bribery a crime at common law. Private prosecutor must have an interest. It is only *suam aut suorum injuriam* that he can pursue, and for which he would have a civil action. Not easy to see what civil action these prosecutors could have. How would this libel look without the last articles? In the reduction of the Fife boroughs, various modes of bribery charged, and admitted to proof, upon the relevancy of which judges differed; and jurymen may differ, about them, as they have no definite crime to go upon. Want of matter in the charge. No place mentioned. This essential, and was so long ago, when libels not so accurate as now-a-days. Not unnatural to resort to the statutes, to see what they hold to be bribery. Read a passage from one. It supposes corruption to follow. It appears from this charge, that corruption did not follow. For dismissing the libel.

The interlocutor was as follows.

"August 1. 1768. The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered the criminal libel pursued at the instance of Robert Geddie junior, merchant in Cupar in Fife, and Robert Macintosh, Esq; Advocate, with concurrence of his Majesty's Advocate, against George Dempster, Esq; of Dunnichen, with the debate and informations thereupon; repell the defence, That bribery and corruption, in the election of magistrates and counsel-

lors of a royal borough, or in the election of a commissioner or delegate of such borough, is not a crime by the common law of Scotland, and actionable in this court. But find the libel, so far as it charges, That the pannel did, by himself, or by others employed by him, corrupt, or attempt to corrupt, by gifts or rewards, or by promises, agreements, or securities for gifts or rewards, a number of the members of the town-council of the said borough of Cupar; and also, so far as it charges, That the pannel, upon one or other of the days of the months of August, September, or October, did, by himself, or by other persons employed by him, by gifts or rewards, or by promises, agreements, or securities for gifts or rewards, corrupt, or attempt to corrupt, or by corruption procure, or attempt to procure, David Ritchie, James Tod, Thomas Greig, Alexander Millar, Primrose Rymer, James Sibbald, and David Duncan, all counsellors of the said borough of Cupar, or one or other of them, or one or other of the other persons then, or now, members of the council of the said borough, to give their votes for certain persons, and not to give their votes for other persons, at the last annual election of magistrates and counsellors, and to give, or promise to give, their votes, in the choice of the commissioner or delegate, as therein mentioned, vague and uncertain as to the place, mode, and circumstances of the crime libelled; and that the pannel, upon a charge so vague and uncertain, cannot be remitted to the knowledge of an assize. And as to the remaining articles of the libel, respecting the pannel's attempts to corrupt James Morres, James Thomson, John Smith, James Campbell, and David Preston; in respect it is not charged, that these attempts were effectual, or that any corrupt bargain was concluded betwixt the pannel and all or any of these persons, or that they, or any of them, voted in the said election of magistrates and counsellors, or in the election of the commissioner or delegate of said borough, in opposition to the interest of the said complainers; find, That they have no proper title to bring this prosecution against the pannel upon the facts so charged, the said prosecution being only with concurrence, and not at the instance

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instance of, his Majesty's Advocate: And therefore dismiss the said criminal libel and the pannel from the bar."

Against this judgement an appeal was brought; but it was remitted to a committee, and never judged.

Adv. Lockhart, Macintosh, Wight, Smith. *Alt.* Solicitor, Swinton, Maclaurin.

N^o 80.

January 19. 1768.

His Majesty's Advocate, and the THISTLE-BANKING COMPANY
in Glasgow,

A G A I N S T

J O H N R A Y B O U L D.

Forger of bank-notes remitted by the court of session to the court of judicary. — Decree of the court of session evidence against him; but if the jury think it insufficient, they may acquit him.

THE indictment set forth, That where, by the laws of this and all other well-governed realms, the forging or counterfeiting, or the procuring and causing to be forged or counterfeited, any securities, bills, obligations, promissory notes, or tickets, for sums of money; and more particularly, the forging or counterfeiting, or the procuring to be forged or counterfeited, the notes of banking, mercantile, or trading companies, issued by them in the course of their business, and which pass from hand to hand in the course of circulation as a medium of commerce, and are received or taken as cash by the lieges in general; as also, the using, uttering, or vending, or causing or procuring to be used, uttered, or vended, any such forged or counterfeited securities, bills, obligations, promissory notes, or tickets, for sums of money; the person so using, uttering, or vending them, or causing them to be so used, uttered, or vend-

ed, knowing them to be false, forged, or counterfeited, are crimes of a heinous nature, and severely punishable; more especially when the commission of such crimes is accompanied with a long train of forethought, contrivance, machination, and artifice, where the crimes themselves are frequently reiterated, and where the securities, bills, obligations, promissory notes, or tickets, for sums of money, forged or counterfeited, used, uttered, or vended, are many in number, and for a considerable sum of money: Yet true it is and of verity, that you, the said John Raybould, are guilty of all and each, or one or other, of the foresaid crimes, aggravated as aforesaid; in so far as the said Sir James Maxwell of Pollock, Baronet, James Ritchie, and Company, having, in the course of their business as bankers, issued a number of promissory notes, payable, at their office in Glasgow, to James Struthers, or the bearer, on demand, for the sum of twenty shillings Sterling each, subscribed by David Fleming, cashier to the said banking company, and John Maccall, one of the partners of said company; which notes did pass and were circulated among the lieges, and became a medium of commerce, by being given and received in payments as money or cash, or in lieu thereof, among the lieges in general; you the said John Raybould, throwing off all fear of God, and regard to the laws, did fraudulently and feloniously devise and execute a scheme for counterfeiting and fabricating a number of notes in imitation of the foresaid notes: for having procured one of the notes subscribed and issued in manner above set forth, you did, on one or other of the days of the month of August, which was in the year of our Lord one thousand seven hundred and sixty-six, or one or other of the days of the month of July preceding, repair to the town of Birmingham, where you applied to an engraver, and desired him to engrave for you a copper-plate as like as possible to that from which the said note, then in your possession, had been cast off; and the engraver having engraved a copper-plate accordingly, you did cause him to rectify some discrepancies which you observed between the impression made by that copper-plate and the note in your possession; and you did further

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ther endeavour to prevail with him to engrave the number, date, creditor's name, and subscriptions of the said John Maccall and David Fleming; but he having informed you, that that could not be done so as to make them exactly resemble the writing of a pen, but would always be distinguishable therefrom, you did employ a person to cast off five hundred impressions from the said plate; and you did solicit and desire the said engraver, and other persons in the said town of Birmingham, to fill up with a pen the dates, numbers, and creditor's names in the blanks of the said impressions; as also, to write the names of John Maccall and David Fleming on them, in imitation of the subscriptions of the original notes; and you endeavoured to engage them to do so, by offering them rewards in money: but they having refused to do as you desired them, you brought the said five hundred impressions along with you from Birmingham to your own house, at the said village of New Merchiston, and shire of Stirling; and in that place, or in other places in the neighbourhood thereof, on one or other of the days of the month of September, in the year 1766, or one or other of the days of the month of August immediately preceding, you did forge or counterfeit the subscriptions of the said John Maccall and David Fleming, subjoining these forged or counterfeited subscriptions to sundry impressions from the copper-plate which you had caused to be engraved in imitation of the notes issued by the said Sir James Maxwell, James Ritchie, and Company; and you did also forge or counterfeit a date, numbers, and the name of James Struthers, in the blanks of the said impressions, in imitation of the manner in which such blanks were filled up in the notes issued by the said Sir James Maxwell, James Ritchie, and Company; or you did cause and procure others to forge or counterfeit the said subscriptions, numbers, date, and name, in manner and for the purpose above mentioned; and on one or other of the days of the said month of September 1766, or of the said month of August immediately preceding, you, the said John Raybould, did, at the said village of New Merchiston, or at other places in the neighbourhood thereof, or at Perth, or other places

ces in the counties of Perth, Stirling, Linlithgow, and Fife, or one or other of them, use, utter, or vend, the notes so forged or counterfeited, or procured to be forged or counterfeited by you, by uttering them yourself, on different occasions, and circulating them as cash, in place of true notes; or by delivering them to others to be uttered and circulated as cash; and by procuring and causing them so to be circulated, uttered, and vended, knowing them to be false and forged. At least, fifty notes resembling the notes issued by the said Sir James Maxwell of Pollock, James Ritchie, and Company, and subscribed by the said David Fleming and John Maccall, were forged or fabricated; and twenty-two of the said false and counterfeited notes were used, uttered, and vended, within the time aforesaid; and you the said John Raybould was guilty, actor, or art and part, in the forging or counterfeiting the said fifty notes; and of using, uttering, or vending, twenty-two of the said fifty forged or counterfeit notes, knowing them to be false or counterfeited; and which fifty false notes are produced and lodged in the hands of the clerk of justiciary, conform to a schedule or list hereto annexed, expressing the particular numbers thereof; which schedule or list is here referred to, and held to be repeated as part of this indictment: And you the said John Raybould having been accused for the said crimes, before the Lords of Council and Session, by a complaint, and an additional complaint, both at the instance of his Majesty's Advocate, for his Majesty's interest, and also at the instance of the said Sir James Maxwell, James Ritchie, and Company, with concurrence of his Majesty's Advocate, mentioning and referring to schedules of the said fifty false notes, and other papers annexed to the said complaints, as having been then produced before the said court, and lodged in the hands of the clerk to the said complaints; and proof having been allowed by the court, and led by the complainers, in support of the said complaints, by the examination of witnesses, and production of writings, the said Lords of Council and Session, by their decret, bearing date the 27th day of the month of November last past, 1767, "found it proven,
" That

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“ That the forty-five notes or writings made in the form of twenty-
“ shilling notes issued by the said Sir James Maxwell, James Ritchie,
“ and Company, bankers, forty-four of which are dated the 3d of
“ June 1765, and the other the 3d of June 1763, particularly spe-
“ cified, and contained in the schedule annexed to the foresaid pe-
“ tition and complaint, being the thirty-six first numbers; and
“ numbers 57. 58. 59. 60. 61. 62. 63. 64. and 65. of the said sche-
“ dule, all now lying in process; as also the five notes or writings,
“ made in the form aforesaid, being numbers 68. 69. 70. 71. and 72.
“ of the said schedule annexed to the additional complaint, also ly-
“ ing in process, and each of them marked by the subscription of
“ the Lord Auchinleck, President for the time, as referred to here-
“ in, are all, and each of them, false, feigned, forged, and fabri-
“ cated; and that the said John Raybould is guilty, actor, art and
“ part, of forging and fabricating the same: And also found it pro-
“ ven, That the said John Raybould is guilty, actor, art and part,
“ of uttering twenty-two of the said notes or writings, as true notes
“ of the said Sir James Maxwell, James Ritchie, and Company,
“ knowing the same to be false and forged, being the following ar-
“ ticles in the schedule, viz. numbers 14. 15. 16. 18. 19. 20. 35. 36.
“ 57. 58. 59. 60. 61. 62. 63. 64. 65. 68. 69. 70. 71. and 72. marked
“ as above by the Vice-President's subscription subjoined to each
“ note, to distinguish these twenty-two writings from the others:
“ and therefore they reduced and improved the said fifty notes or
“ writings, and decerned and declared accordingly; and remitted
“ the said John Raybould to the court of justiciary.” Which de-
creet, or extract thereof, together with the said fifty forged and
counterfeit notes, to which it relates, are all now lodged in the
hands of the clerk to the court of justiciary, that you may see the
same; and the said decreet is to be repeated before the court of justi-
ciary as evidence against you, of your being guilty of the crimes a-
bove mentioned. And your guilt in the premises, or your being
art and part therein, being found proven by the verdict of an affize,
before the Lords Justice-General, Justice-Clerk, and Commissioners
of

of Justiciary, you, the said John Raybould, ought to be punished with the pains of death, and confiscation of moveables, to the terror of others to commit the like in time coming."

After the indictment was read, the prisoner was asked, what he had to say? he answered, That he was not the person tried before the court of session; and his counsel argued, it was necessary to prove the identity here as in an attainder.

The counsel for the prosecutors thinking this objection good, deserted the diet *pro loco et tempore*, as they had not served any list of witnesses upon the prisoner, and so could not have proved the identity. — Upon this he was recommitted.

Afterwards he was of new indicted as before, and a list of witnesses served upon him, containing persons that could prove the identity, such as clerks of session, keepers of the prison, &c.

Upon this, to save trouble, he admitted himself to be the person that was tried before the court of session, pleaded, Not guilty, and the trial went on. The decree of the court of session was read to the jury. He petitioned for production of some papers which had been exhibited before the court of session; and the prosecutors *ex gratia* consenting, production of them was ordered, and the agent for the prosecutors deponed as in an exhibition. The prisoner's meaning in this was, to prove, that another person had filled up the subscriptions to the notes.

Mr Solicitor said, The jury had better bring in their verdict in the terms of that against Serjeant Young, N^o 57. which bears, "In respect of the decret of the court of session, finds him guilty," than in the terms of that against Mrs Macleod, N^o 39. which bears, "That, by the decret of the court of session, the libel was proved." — The counsel for the pannel quoted Lord Bankton; who, in his Institute, (vol. 1. p. 298.), says, "The jury may acquit the pannel, if the proof that convinced the court of session be not satisfactory to them."

In this case, though capital, the Lord Justice-Clerk thought it proper

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proper to speak to the jury, in order to explain to them the peculiar nature of trials for forgery; his Lordship at the same time told them, that if they thought the judgement of the court of session erroneous, they might find the prisoner not guilty; and the rest of the Lords were of the same opinion.

The jury unanimously brought in a verdict, "in respect of the said decret, finding him guilty art and part of the crimes libelled;" and their foreman said, they had not rested upon the authority of the court of session, but had considered the proof recited in the extract of the decree.—He was condemned to be hanged, and executed accordingly.

Adv. Solicitor, Wight, Maclaurin, Crosbie. *Alt.* Rae, Armstrong, Ja. Boswell.

Sir George Mackenzie, Lord Stair, and others, are agreed, that a decret of the court of session, finding a forgery proved, and remitting the perpetrator of it to the justiciary, is *probatio probata*; and that the jury, upon production of it, must find him guilty. Lord Bankton alone holds the reverse to be law; and he is unquestionably in the right.

There is good reason for making the court of session competent to this crime, though it be a civil court; there is good reason for denying the person accused of forgery the privilege of forcing on his trial within a limited time; and there is good reason for leading the proof, not (as in other crimes) in presence of the jury, but before the Lords of Session. All these transgressions of the common rules of law are necessary; because in forgery the expiscation of the truth is commonly very tedious and difficult, and consequently not inconsistent with the dilatory forms of the session, though incompatible with the peremptory dispatch of the justiciary. But as there is no necessity for any more exceptions, there is no foundation for maintaining, that a verdict should pass of course upon a remit from the session.

N^o 81.

February 1768.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JAMES ARCHIBALD.

*The diet may be deserted pro loco et tempore, and the pannel recommit-
ted, after an interlocutor on the relevancy has been pronounced.—Kill-
ing in a quarrel, not with a weapon, but blows with the fist, not
murder.*

HE was indicted for murdering Peter Lawfon, day-labourer at Duddingstown, on the 23d September 1767, in so far as he did, then and there, assault the deceased again and again, and by blows with his hands did beat him to the ground, and either killed him by these blows, or choked or strangled him, when upon the ground, with his own cravat, or a handkerchief, which was about his neck.

He pleaded, Not guilty; and his counsel argued, Dec. 14. 1767, That as he was neither charged with a premeditated intention of bereaving the deceased of his life, nor was the mode of bereaving him of his life so qualified as that a legal presumption of such intention was necessarily to be inferred from the act itself, the libel as laid was not sufficient to establish the crime of murder against him, the facts in it amounting to no more than casual, or at most culpable, homicide.

The court, Dec. 18. 1767, took the debate to consideration, and some days after found the libel relevant, and allowed the prisoner to prove all facts and circumstances, &c. and appointed a day (Dec. 21.) for taking the proof.

When the court met for that purpose, Mr Solicitor set forth, That on account of some circumstances lately come to his knowledge, he found it necessary to desert the diet *pro loco et tempore*; and he moved
the

the court therefore to desert the diet, and grant a new warrant for recommitting the pannel.

This was opposed by the counsel for the pannel; who contended, That by the interlocutor pronounced on the relevancy, an act of litiſcontestation had taken place; and that the pannel, in consequence of the judgement, was intitled to be tried by a jury upon the indictment now in court, and either absolved from the charge of murder, or condemned.

The court having ordered informations on this point, they were given in accordingly.

The plea maintained for the prisoner was, That as the Advocate had charged him with the crime of murder, and he had pleaded, Not guilty, and argued various points of law in his defence, on which the court had pronounced a judgement, litiſcontestation had been made, and thereby he had a *jus quesitum* to be tried by a jury upon this indictment as it stood, if the Advocate insisted; and he ought to be dismissed from the bar if his Lordship did not insist. The Advocate cannot, by deserting the diet *pro loco et tempore*, deprive the prisoner of the benefit of the judgement pronounced, and afterwards bring a new indictment, either in the self-same words, or containing a different charge. If this were competent to the King's Advocate, it must likewise be competent to a private prosecutor; for the former was not more privileged than the other; and the consequence would be, that though the prisoner can, by no form or device whatever, when judgement stands against him, apply for a rehearing; yet the prosecutor, in all cases, may reclaim as often as he pleases in an indirect method. Formerly it was the practice to pronounce articulate interlocutors of relevancy, both with respect to the libel and defences; and though that practice has for some time past been departed from in most cases, yet it sometimes is still followed, and may at the pleasure of the court be again rendered general. Now suppose that the relevancy of a defence has been sustained by the narrowest plurality, the prisoner has a manifest interest to proceed to trial; because, if he proves the defence, he falls

to be affoizied in consequence of the judgement pronounced. Suppose further, that one of the judges who voted for sustaining the defence is removed from the bench, either by death or disease, it is plain, that if the prosecutor may desert the diet, bring a new action, and again force the prisoner to debate the relevancy, his defence that was formerly sustained may be now over-ruled, and a man doomed to death by this second judgement, who would have been acquitted had he gone to trial the day before upon the first.

In answer, it was argued for the prosecutor, *first*, That he cannot admit there is any thing in our criminal trials similar to the Roman *litifcontestation*, which was a judicial contract, binding upon the parties from their consent. This may do very well in civil cases, because a man may dispose of his property as he pleases; but it will not hold in criminal cases, because the law cannot admit of the idea of a person contracting for the disposal of his life or limbs: *Nemo est dominus membrorum suorum*. And hence, though some writers on the criminal law do mention *litifcontestation* in general, yet they do it but slightly, and are not well agreed what it is, or when it takes place: and the truth is, that however proper *litifcontestation* may be in civil cases, in which the nature and effects of it have been accurately ascertained, the nature of, and procedure in, criminal cases, is so very different, as not to admit of this form.

But, *2dly*, Supposing *litifcontestation* to be adopted into the criminal law, there is no reason why it should take place on pronouncing an interlocutor on the relevancy. There are two other periods at which it would seem more properly to commence; either when the prisoner pleads to the indictment, or when the jury are charged with the prisoner. At the beginning, if the diets are not called, and either proceeded in or continued, the instance falls, and the prisoner must be dismissed. After the jury are set, the trial assumes a different form; for after that period, it must be brought to a conclusion, and there can be no continuation. These two periods, therefore, are important; but the judgement on the relevancy gives no new form to the trial; nor is the diet considered to be a whit strong-

er after that judgement than it was before; and the court has as much the power of adjournment after it, as it had before.

Further, the prisoner mistakes the nature of the Roman litiscontestation, and the period of its commencement. It appears from Geddeus, *ad l. 36. ff. De verb. signif.* and other civilians, that litiscontestation was entirely the work of the parties, and not of the court. After the parties had opened their different alledgences to the magistrate, he appointed a judge to try the facts, and gave him a form by which he was to determine. This was called the *litis constitutio*, and was exactly similar to the interlocutor upon the relevancy with us. After the judge was appointed, the parties entered into a stipulation, binding themselves to stand to the decree of that judge; and thereupon took the bystanders to witness. This was litiscontestation. Hence it is plain, our interlocutor on the relevancy is not the *litis contestatio*, but the *litis constitutio*; and if litiscontestation is to be squeezed into the forms of this court, it can only take place when the jury are set. Matthæus, p. 472. Carpzovius, par. 3. quæst. 106. § 67. 70. 71. et quæst. 113. § 9. treat but slightly of litiscontestation, and make it arise when the party pleads to the indictment. Mackenzie takes no notice of it at all; which is strong evidence that it is unknown to our criminal law.

3dly, The Roman litiscontestation, and that which obtains in our civil courts, puts an end only to declinatory or dilatory defences; but does not bar either party from varying or amending their alledgences upon discovery of new matter. *Heinec. Pand. par. 2. § 43.; Stair, b. 4. tit. 40. § 4. 5. et 6.* This is all the prosecutor contends for, when he maintains, the Advocate has a power of deserting diets, and bringing new prosecutions at pleasure. If the prisoner were to be allowed such power, no trial would ever go on; therefore he has it not. At the same time the prosecutor admits, that the court may, and ought, to give him relief at any period of the trial, when a new defence occurs, or a discovery of something favourable to him has been made. The Advocate should not desert the diet, and bring a new trial, unless something material occurs; and he never will do
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so without good reason. That, however, he is not obliged to explain, as the law presumes, that he means what is fair to the prisoner, and is incapable of abusing his office. The information he receives, however, is very often inaccurate. Material witnesses often do not appear; and on these, and other accounts, it is absolutely necessary that the Advocate should have a power of deserting the diet. The prisoner's notions of litiscontestation might often be hurtful to men in his situation; as in the case of an act of indemnity passing after the interlocutor on the relevancy, and before the diet for taking the proof, or of some material witnesses for him being withdrawn or disabled from attending.

A private prosecutor is in a different situation from the Advocate; because the law does not establish the same presumptions in his favour; and therefore, if he were to desert the diet in order to bring a new trial, the court would not allow him without showing good cause. But a breach of oath and of office is not to be presumed; and as expediency and necessity require, that the Advocate should have such power, it must be allowed him, unless the prisoner can point out a statute positively discharging it. The bare possibility of abuse cannot be listened to. There is no reason to fear any will be committed by the Advocate, or by the judges of this court; to which the prisoner pays a very bad compliment, in supposing, that an interlocutor, sustaining the relevancy of the defence, could be altered upon a change happening in the bench.

The act 1701 may quiet the prisoner's fears, as it forces the Advocate to bring trials to a conclusion within a reasonable time: and it must be observed, that this statute supposes a power of deserting diets at any period. It enacts, That if *no process be raised, and executed, within the time allowed, or in case of not insisting at the diet, and bringing the process to a conclusion within the aforesaid space, it shall be lawful, &c.*

Though the Advocate has not very often occasion to make use of this power, yet several precedents since 1700 have been discovered that are in point; case of Hamilton, 30th July 1716; case of Provost

vost Stewart in 1747, in which the very objection now stated was offered and over-ruled: and case of Sinclair at the circuit at Inverary 1761.

The case of Janet Ronald [see N^o 72.] not only confirms the prosecutor's doctrine on this point, but carries it a great deal further. The judgement in her case establishes, that the diet may be deserted even after the jury is inclosed, when there is a good reason for it. Case of Alexander and Charles Kinlochs in October 1746, taken notice of by Justice Foster. The law of England is more tenacious of forms than that of Scotland; and this decision shows, that the English judges will not allow forms to get the better of justice. In the case of Kinlochs, the jury were charged with the prisoners; and therefore the trial undoubtedly should have gone on, and a verdict been returned. It was contrary to form to hear the prisoners upon their defence at that period of the trial; yet, notwithstanding, the English judges dispensed with the form. The way of getting the better of it in England is by withdrawing a juror; the way of doing it in the court of Justiciary is by deserting the diet.

Replied for the prisoner: Two capital mistakes run through the prosecutor's argument; *first*, That he has an incontrollable power over the diets of court; *2dly*, That he has a much greater power in criminal actions than a private prosecutor.

As to the first, it is the court alone that possesses any power over its own diets; and no person whatever can interfere as to this matter: And accordingly the records never bear, that the Advocate deserted the diet, but that he moved the court, that the diet should be deserted; and upon this the court pronounced an interlocutor, deserting it accordingly; and sometimes without any motion, the court does it *ex proprio motu*. This procedure is agreeable to the law; which requires, that every prosecutor, before he can raise a criminal action, shall find caution, not only to report the criminal letters duly executed, but that he shall insist at the diet appointed. This is enacted by the statute 1579, c. 28. which makes no distinction: so that

that it is clear, that every prosecutor, unless he obtain leave from the court, is under a legal necessity of proceeding.

As to the prosecutor's other mistake, the truth is, that the powers of the Advocate do not differ from those of a private prosecutor; or if there is any difference, those of the latter are the most extensive. In the early periods of our law, there was no public prosecutor. It appears from our old law-books, that prosecutions anciently were brought either at the instance of private parties having a proper title, without any public aid or concurrence, or else without any private prosecutor, upon a dittay taken up by an inquest, much in the same manner that bills are found by a grand jury in England; and a roll of these dittays was called the *Porteous roll*.

Punishments, during the infancy of our law, were but few in number, and generally corporal; afterwards it became fashionable to punish by escheats, forfeitures, and fines. Hence the fisk had an interest in every trial, and its officers lent their aid to prosecutors. This practice probably crept in about the beginning of the 16th century, as before that there is no mention of the Advocate as a public prosecutor, nor indeed any mention of him at all. Long after he interfered in trials, he never proceeded without a private prosecutor, who, in our statutes, is generally denominated the *informer*. This appears in part from the above-mentioned act 1579, and from several others. His interest was dependent on that of the private party, who could discharge the prosecution without the Advocate's consent, and against his will: but by the statute 1587, c. 7. it is enacted, That the treasurer and advocate pursue slaughters, and other crimes, though the parties be silent, or privily agree. That this act passed merely *in commodum fisci*, is plain from the treasurer having a right of action as well as the advocate. But it gives no powers to either of them beyond what the private party possessed; nor can it be interpreted so as to make the instance or concurrence of either necessary in criminal processes, or to exclude a private prosecutor, who has a proper title, from insisting, without the aid of the public officer. And so Sir George Mackenzie understands it: for in his observations

tions upon it, he says, "As parties may pursue crimes without "concourse of the King's Advocate, so by this act the King may "pursue without an informer, *ad vindictam publicam*." No statute since hath increased the Advocate's power in this matter; so that it now stands precisely as it did in 1587. Whatever inclination there may be at present to magnify his power, this proceeds probably from this office having been exercised for a long period with great propriety; but as the experience of times past shows it has been abused, there is great reason to beware of stretching its power beyond the limits prescribed by law.

As to litiscontestation, crimes are perhaps rarer in Scotland than in any other country. The consequence of which is, that our criminal law is not well ascertained by precedents; and it would appear the point in question has never been deliberately argued or determined: but it often has in the civil courts, Dict. *voce* Process; and there is reason for giving as much effect to litiscontestation in criminal as in civil cases. Indeed there is more reason for shortening the procedure in criminal trials; and accordingly the forms of court are all calculated so as to effectuate that purpose. Hence the diets are peremptory.

The forms of the Roman law are not well known to us; and it is unnecessary to enter into a disquisition upon litiscontestation among the Romans; for it is not upon a word that the prisoner's argument rests. The prosecutor's quotations apply only to the proceedings before the prætor in civil cases: the criminal trials were before the *comitia*, where neither prætors nor *judices pedanei* could interfere.

Though it is true, that men cannot by contract dispose of their life, liberty, or limbs; yet the judicial acts and deeds of parties may produce certain effects, which, if investigated by principles, resolve into a judicial *quasi* contract. Thus a man may plead guilty, and will be condemned upon his own confession, without any proof. He may wave objections to the relevancy, go to trial, and be convicted; nor would the proceedings be annulled, though it could be

shown, that a good defence lay against the libel, and that the prisoner knew it.

This affords an answer to the cases of Hamilton, Stuart, and Sinclair: for in none of these was any objection moved against deserting the diet; so that the prisoner was tied down by his own tacit consent; and in Stuart's case the motion for deserting the diet expressly reserved a power to bring a new action. And as to Ronald's case, in so far as it finds any more than that the verdict was illegally returned, it determines a case that was not truly before the court, and of which it had not an opportunity of being deliberately informed: so in that view it cannot claim the authority of a precedent. But further, it is not to be inferred from the judgement in that case, that an interlocutor on the relevancy does not give the prisoner a *jus quesitum* of going to trial upon the libel that has been found relevant: it only establishes, That when the death of a juryman, or such accident, makes it impossible for the jury that was charged with the prisoner to return the verdict, that jury may be discharged, and a new one called: but it follows not from this, that the second jury is to be unconnected with the libel. The same libel that was exhibited in court is that on which the trial must proceed; and the prisoner must be tried by a jury selected out of the list of forty-five subjoined to that libel.

As to the law of England, quoted for the prosecutor, its forms are quite different from those of the law of Scotland. With us every point of law ought to be settled before the libel goes to the jury; and regularly no question of law can occur after a verdict, excepting it be special: but in England, every thing is entire to the last, and may be pleaded in arrest of judgement after the verdict. At the same time, however, the case quoted from Foster has no connection with the present. The prisoner had been led into an error in point of form, by relying on the opinion of the court. The error was discovered in time; and the court, prosecutor, and prisoner, all concurred in laying hold of the legal remedy.

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The court pronounced the same interlocutor upon this indictment they had done on the former, and the trial proceeded.

The jury brought him in not guilty.— See the reason in one of the opinions on Campbell's case in 1769.

Att. Pat. Murray.

Alt. Crosbie.

N^o 82.

September 1768.

JOHN LACHORE, with concurrence of his Majesty's Advocate,

A G A I N S T

JAMES STEVEN, and others.

Libel, in which, by mistake, most part of the major proposition was left out, dismissed.

These defenders were brought to trial, for a riot, before Lord Almoor, at a circuit-court held at Glasgow in September 1768.

By mistake, in writing out the criminal letters, the greatest part of the major proposition was a-wanting; for they set forth, "That whereas by; yet true it is and of verity, that—" and then the fact followed.

It was objected for the defenders, That the libel ought to be dismissed, because it was not founded on any law, and was nonsense as it stood.

Answered, The libels are commonly conceived in the form of a syllogism; yet it is not necessary they should be so. It is sufficient to charge a criminal fact properly; and that is done in the minor proposition of this libel.

Replied. Supposing a syllogistical form were not essential, yet when that form has been adopted, it surely must be followed out.

The judge dismissed the libel.

Att. Crosbie.

Alt. Maclaurin.

N^o 83.

Nov. 1768.

The PROCURATORS-FISCAL of the Sheriff-court of Edinburgh,
A G A I N S T

JOHN FORTUNE, and others, vintners and poultrymen in Edinburgh.

Game laws.

AS the facts and arguments on both sides are fairly stated in the paper for the procurators-fiscal, it shall be inserted *ad longum*.

“Answers for John Gibson and William Walker, conjunct procurators-fiscal of the sheriff-court of Edinburgh, to the petition and appeal of John Fortune, &c. vintners in Edinburgh; and to reasons of appeal for John Watson, &c. poultrymen in Edinburgh, from a judgement or interlocutor of the sheriff-depute of Edinburgh, pronounced against them upon the petition and complaint of the said John Gibson and William Walker.

The Scots legislature had an early attention to the preservation of the game. They considered the sports of the field as connected with that turn and disposition of mind adverse to softness and effeminacy, and productive of useful and manly achievements.

That such was the opinion of our forefathers, we learn from various parts of our statute-book. Thus the preamble of the act of James VI. 1600, cap. 23. against the slaughter of wildfowl, sets forth, “Forasmikleas, by common consuetude of all countries, special prohibition is made to all sorts of persons to slay wyldfowl, hair, or vennison, except sik as by their revenues may beare the charges and burdings of the haulkes, hounds, and dogs, requi- fite in sik pastymes, in respect the famine as well hes been created for the recreation of mankind as for their sustentation; lykeas it is of truth, that by diverse and fundry acts of parliament, o-

“ther

“ther statutes and proclamations made heretofore, all slaying of
 “wyld fowl and beasts, by any indirect means, sik as hagbut, grin,
 “net, and fowler-dog, is specially forbidden, and diverse penaltys
 “contained in the famine acte; yet nevertheless, sik hes bene the
 “slackness of execution of the famine, that diverse and fundry per-
 “sons, *having greater regard for their gain and commodity*, whilk they
 “purches by the felling of the wyld fowl to sikpersons wha *persers*
 “*their awn inordinat appetite and gluttony*, either to the obedience of
 “the lawes, or to the recreation that may be had by the direct
 “slaying of the samen, hes used all the said indirect means in slay-
 “ing of the saids wyld fowles and beasts, whereby this country,
 “being so plentifully furnished of before, is become altogether
 “scarce of sik waires: For remed whereof, and that the continuing
 “of the said abuse may not procure worse inconvenients, *seeing in*
 “*time of peace, in all time bygone, the said pastimes of hunting and*
 “*halking were the only means and instruments to keep the baill liedges*
 “*bodies frae not becoming altogether effeminat.*”

The same language is held forth in the act of James VII. 1685,
 cap. 20. intituled, *Act for preserving the game*, the enactments of
 which proceed upon the narrative of “the great prejudice the king-
 “dom doth sustain in the decay of deer, roes, and wildfowl; and
 “that there is not only danger of an utter decay of so useful crea-
 “tures, *but the manly exercises of hunting and hawking is like to be al-*
 “*together neglected.*”

Such were the sentiments of our ancestors; and if a century ago
 the legislature of this country thought it an object worthy of atten-
 tion to preserve for the lieges every amusement of a manly and ge-
 nerous nature, it will not appear an object of less attention to those
 who are called upon to execute the laws in these later times, when
 cards and dice, and every other sedentary amusement, which the
 effeminacy of modern invention can devise, seem to gain so much
 ground, in competition with more manly and less ruinous recrea-
 tions.

Your Lordships will no doubt recollect the severity of last win-
 ter-

ter-season, when the long-continued storms of snow afforded a fair opportunity to every poacher and destroyer of game to kill whatever quantities he thought proper; in so much that there was not a single day when the streets of this city were not covered with game of every kind, to the number of hundreds at a time: the effects of which every sportsman can now tell; for, without exaggeration, it can safely be averred, that if a season of a similar nature was soon to happen, and the like practices allowed to go on, there would be almost a total annihilation of the game in the Lowlands of Scotland.

Every gentleman in the country saw, that such was to be the effect of those abuses; and loudly complained, that the executors of the law should be so very inattentive to preserve for them those amusements and recreations upon their own property, which the legislature had guarded with such anxious care.

In those circumstances, the respondents thought it their duty to step forth in a spirited and vigorous execution of the law, even although it should procure them the ill-will of those, who, in the language of the act of parliament, *preferred their own inordinate appetite and gluttony, either to the obedience of the laws, or to the recreation that may be had by the direct slaying of the game.*

Accordingly a complaint was exhibited to the sheriff-depute of this county, at the instance of the respondents, conjunct procurators-fiscal of court, libelling upon the statutes for the preservation of the game; particularly upon the acts the 24th of his late Majesty, and the 1st of his present Majesty, calling the appellants as defenders; and concluding, That they should be fined and amerced, conform to their particular offences contained in the foresaid acts; the one moiety of said fines payable to the pursuers, and the other moiety to be given to the poor, for a terror to others to commit the like in all time coming.

It is unnecessary, either to recite the particular defences which are stated in the petition, and will fall hereafter to be taken notice of, or to narrate the different steps of procedure; the regularity of which
are

are not, nor cannot be controverted, as will appear to your Lordships from the extract of the proceedings produced.

The sheriff, Feb. 19. 1768, pronounced the following interlocutor, as applicable to the respective defenders, who are either vintners and tavern-keepers, or venders of poultry within the market of Edinburgh. " Having seen and considered the complaint, with the
 " declarations of the defenders, John Fortune, Janet Gardner, William Grant, Richard Mackenzie, and James Thom, and oath of
 " the defender Christopher Alexander, holding as confessed against
 " the defender Angus Macduffie; and answers for the defenders,
 " James Austine, William Mackay, Alexander Maclardie, John
 " Watson senior, John Watson junior, James Robertson, Andrew
 " Inch, William West, Gilbert Macmillan, Archibald Ronaldson,
 " and Robert Brown; he found the complaint proven against the
 " defender Angus Macduffie, by the holding as confessed; found
 " him liable in the sum of 20 s. Sterling, for having game in his
 " possession contrary to the 24th act of King George II.; found him
 " also liable in the sum of L. 5 Sterling, for having contravened the
 " act of parliament of the 1st year of his present Majesty, for pre-
 " servation of the game; repelled the defences for the defenders
 " James Austine, William Mackay, Alexander Maclardie, John
 " Watson senior, John Watson junior, James Robertson, Andrew
 " Inch, William West, Gilbert Macmillan, Archibald Ronaldson,
 " and Robert Brown; and found, That the act of parliament of
 " King George II. is not recalled by the subsequent act passed in
 " the 1st year of his present Majesty, and that the magistrates of E-
 " dinburgh have no power to dispense with either of the acts of par-
 " liament; therefore allowed the complainers a proof of their com-
 " plaint, and the said defenders a conjunct probation, and granted
 " diligence *hinc inde*: Found it proven, That the defenders John
 " Fortune and James Thom had each of them contravened the said
 " act of the 24th year of King George II.; therefore fined and amer-
 " ciated each of them in L. 3 Sterling: Found it proven, That the
 " defender Janet Gardner had also contravened the said last-men-
 " tioned

“ tioned act; therefore fined and amerced her in L. 2 Sterling:
“ Found it proven, That the defenders William Grant, Richard
“ Mackenzie, and Christopher Alexander, had each of them contra-
“ vened the said act of the 24th of King George II. ; therefore fined
“ and amerced each of them in L. 1 Sterling.”

Against this judgement, the different defenders have lodged a separate petition, and reasons of appeal; in answer to both of which, the following observations are humbly offered to your Lordships.

It has been already observed, that the complaint is chiefly laid upon the act the 24th of his late Majesty, and the act passed in the 1st of his present Majesty. The prohibitions of the former are in the following words. “ That no person in Scotland
“ shall, upon any pretence whatsoever, kill or destroy any muir-
“ fowl from the 1st day of January to the 10th day of July, or any
“ partridge or heath-fowl from the 1st day of February to the 20th
“ day of August, in any year. That no person whatsoever, not
“ qualified to kill game in Scotland, shall have in his or her custody, or carry at any time of the year, upon any pretence whatsoever, any hares, partridges, pheasants, muir-fowl, heath-fowl, snipes, or quails, without the leave or orders of a qualified person first obtained, for carrying such hares, or other game, or for having the same in his or her custody.”

The prohibition of the latter statute is, “ That no person in Scotland shall, upon any pretence whatsoever, take, kill, destroy, carry, sell, buy, have in his or her possession or use any muir-fowl, or termagan, between the 10th day of November and the 25th day of July in any year; nor any partridge, between the 1st day of February and the 1st day of September in any year; nor any pheasant, between the 1st day of February and the 1st day of October in any year; nor any heath-fowl, commonly called *black game*, between the 1st day of December and the 25th day of August in any year.”

None of the defenders pretend to justify any offences committed against the last of those statutes, which respect solely the destruction of game within a certain limited time, and enlarging that prohibited

bited season more than it was done by former statutes. The other statute is general, and unlimited in its prohibitions; and, as the respondents are advised, must at all seasons and periods for ever exclude these whole appellants, either from selling or purchasing game in the manner now practised; and therefore the whole ingenuity of the appellants, in their present application to your Lordships, has been directed to exempt themselves from the sanction of the statute the 24th of his late Majesty.

The grounds upon which this plea is founded shall be considered in their order: first, those offered in behalf of the vintners; and then the reasons of appeal exhibited in behalf of the poultry-men, in so far as they may not be already obviated in considering the case of the vintners.

1st and 2d reasons of appeal. The appellants, in their first and second reasons of appeal, endeavour to satisfy your Lordships, that the prohibition of the act the 24th of his late Majesty, although most general in its expression against all unqualified persons carrying or having game in their custody, is, notwithstanding, to be limited to common carriers and poachers; and not to be understood of *bona fide* purchasers and consumers of game, during the time when the same may be lawfully killed.

Answer. The respondents will be pardoned to observe, in general, That no idea can be more absurd than that which the appellants would endeavour to impute to the British legislature. It is not for amusement or recreation that the poacher is so active in destroying the game; but the love of gain, and the tempting prices thrown in his way by these very appellants, are his motives for trespassing against the law. It would therefore be very extraordinary, if the legislature should pass over those who are the chief cause of the evil, *and easy to be discovered*, and apply the whole vigour of its enactments against a set of poor country-carriers, who are not only the least culpable, but the most difficult of detection; and this too at the very time when they are specially employed in framing an act, *for the better preservation of the game in that part of Great Britain called Scotland*;

land; when every body knows, that the destruction of game in this part of the country is chiefly owing to the encouragement given to poachers by the poultrymen and vintners in this city, joined to a few, whom prodigality, luxury, vanity, or affectation of pomp, excite to entertain their guests in defiance of law.

It is extremely true, that the preamble of the statute proceeds upon the narrative of the abuses of carriers, poachers, and others, carrying and selling the game. This was most natural; because, as already observed, it is by means of them solely, that the appellants and others are furnished with the means of breaking the law. But because the statute, having this in view, proceeds upon such a preamble, nothing surely can be more inconclusive, than from thence to attempt a limitation of the prohibition of a statute which is framed in words as general as can be devised: "*That no person what-ever, not qualified to kill game in Scotland, shall have in his or her custody, or carry, at any time of the year, upon any pretence whatsoever, any hares, partridges, pheasants, muir-fowl, heath-fowl, snipes, or quails, without the leave or orders of a qualified person first obtained for carrying such hares, or other game, or for having the same in his or her custody.*"

But, more particularly, the respondents beg leave to observe, and to maintain, that the idea of a *bona fide* purchase and consumption of game from a public market, is, and always was, repugnant to the system of the laws for the preservation of the game. The whole object of the legislature has been, to preserve the game for the use and benefit of those of rank, fortune, and property, in order to furnish them with a recreation manly in itself, and adverse to the destructive arts of effeminacy and softness. When this was the idea of the legislature, it is impossible they could form a notion of a *bona fide* selling, or of course buying, game in a public market.

Accordingly your Lordships will observe, that, as far back as the 1600, when the love of gain on the one hand, and a spirit of sensuality on the other, had begun to make game a matter of purchase and sale, the legislature, in the act 1600, cap. 23. the preamble of which

which is above recited, specially interposes to prohibit and “dis-
 “charge *any persons whatever* within this realm, in any ways to sell
 “or buy any fastan, reid, or fallow deer, daes, raes, hares, par-
 “tridges, muir-fowls, black cocks, aith-hens, termigants, wild
 “ducks, teilles, atteilles, goldings, mortyms, schidderenis, skail,
 “draik, herron, butter, or any fik kynde of foulis, commonly used
 “to be chased with halkes, under the pain of an L. 100, to be in-
 “curred as well by the buyer as the seller; and in case of inability
 “of any of the faids persons to pay the faid sum, that the appre-
 “hender of them shall cause them to be scourged through the bo-
 “rough or town where they shall be apprehended.”

The same prohibition is repeated in the act 1621, cap. 30. intituled,
An act restraining the buying and selling of certain wild fowls; and
 the contravener, whether buyer or seller, is subjected to a penalty
 of L. 100.

The act 1685, cap. 20. intituled, *Act for preserving game*, pro-
 ceeds upon the narrative, That the game-laws, although in force
 and unrepealed, had, by the distraction of the late times, not been
 sufficiently regarded; and therefore it revives, renews, ratifies, and
 approves, almost *nominatim*, the whole former laws and acts of par-
 liament made for preserving the game; and, amongst others, it re-
 vives the act 1600, cap. 23. forbidding the selling or buying of
 game for the space of seven years, under the pains contained in the
 faid act.

Thus your Lordships will observe, that the game-laws are so far
 from giving any encouragement or countenance to the idea of a *bona*
fide purchase or consumption of game from a public market, that it
 has repeatedly, and in different statutes, prohibited and discharged
 the buying or selling of game by any persons, whether qualified or
 unqualified: and although this prohibition may not now remain in
 its full extent with regard to qualified persons, on account of its be-
 ing only temporary for seven years in the act 1685; yet the respon-
 dents will almost venture to say, that there is not any one clause in
 any one statute, which supposes the legality of any unqualified per-

son felling game, or purchasing it, or having it in their custody, publicly or privately, except through the medium, or by the licence, of a qualified person.

Obj. The appellants found an argument upon the act of the Scotch parliament, passed in the year 1707, cap. 13. which discharges the felling, buying, or using of game, during the prohibited season: and from this it is argued, That if the statute 24th of the late King had meant to prohibit the *selling, buying, or using*, by unqualified persons at all times of the year, it would have done so in these very words, as it did in the former act 1707.

Answer. But this observation proceeds entirely upon a misapprehension of the intendment of these words, *selling, buying, or using*, when applied only to prohibited times, as in the act 1707. Your Lordships will here again attend to the progress of our statute-law. Various acts of parliament had at different times been made, prohibiting the killing of game at certain times and seasons, destructive to the game in general. This was done in the act 1427, cap. 108.; likewise in the act 1555, cap. 51. The act 1600, cap. 23. made a similar enactment; as did also the act 1685, cap. 20. But all of those statutes were defective in this respect, that the penalties were enacted only against the actual killers and destroyers of the game during the prohibited period; but there was no penalty against the *sell-ers, buyers, or users*, of such prohibited game. The act 1707, cap. 13. remedied this defect, and not only prohibits the killing of muir-fowl and partridges in certain seasons, under a certain penalty, but “*for the better preventing the killing of these fowls during the fore-*”
“*said prohibited seasons, her Majesty, with advice foresaid, does*”
“*strictly prohibit and discharge the selling, using, or buying of*”
“*these fowls during the foresaid seasons.*”

The prohibition in this last act relates solely to qualified persons, whom the law meant not only to restrain from destroying the game during the prohibited time, by a penalty against the destroyer, but likewise by enacting a penalty against the *seller, buyer, or user*, of such game. No further prohibition was necessary with regard to
unqualified

unqualified persons ; because at no time whatever could they legally kill game, nor could they warrantably have it in their custody at any time, except through the medium and intervention of a qualified person.

From what has been said, the respondents will conclude with observing, that the attempt of the appellants to limit the general prohibition of the act the 24th of his late Majesty, in the manner endeavoured by them, is void of all foundation. Not only are the words general, but the generality of the prohibition has been shown to be entirely consistent with the whole spirit and genius of the laws relative to the preservation of the game. There never was any period when unqualified persons could lawfully sell, buy, use, or have game in their custody, without the intervention of a qualified person ; and the act the 24th of his late Majesty has done no more than to say, in one short, general, and expressive prohibition, what was at all times understood to be the law of Scotland with regard to the preservation of game.

3d reason of appeal. The appellants next endeavour to satisfy your Lordships, that the statute the 24th of the late King must be held as recalled and abrogated by that of the 1st of his present Majesty ; for that this latter statute, after the example of the Scotch act 1707, cap. 13. has discharged the buying, selling, and using, only in prohibited times, without making any reservation of the restriction in the former act as to qualified persons being alone intitled to have game in their custody *at any time*.

Answer. This seems to be the substance of the argument ; but it is altogether without any solid foundation. It has been already shown, that the introduction of the penalty against buyers, sellers, and users, was a *new enactment*, introduced by the act 1707, cap. 13. for the further security of the game during the prohibited times ; because all former statutes relative to that point had been defective, in so far as the penalty was only enacted against the actual destroyer of the game. It has likewise been shown, that the act 1707 was only calculated for the direction of those in prohibited times, who were
qualified

qualified to hunt and kill game at other times; and did by no means intend, in any degree, to extend the right of those who, by the former statutes, were altogether unqualified with regard to game.

The same observations do exactly apply to the act the 1st of his present Majesty. There was no intention, by the enactment of it, to alter or innovate, in the smallest degree, the legal qualification of a sportsman: it was intended solely for the regulating the conduct of the lawful sportsman, by enlarging the prohibited time more than was done by the act the 24th of his late Majesty.

This is too clear to admit of doubt; and to maintain the contrary, is to argue directly in contradiction both to the rubric and the letter of the statute passed in the 1st of his present Majesty. For when we look to the rubric of the statute, it does not say, An act for repealing an act passed in the 24th year of the reign of his late Majesty; but, An act for repealing PART of an act passed in the 24th year of his late Majesty; and when we look to the letter of the statute, it tells us what that part is, by enacting, "That from and after the
 " passing of this present act, so MUCH of an act passed in the 24th
 " year of the reign of his late Majesty King George II. intituled, *An*
 " *act for the better preservation of the game in that part of Great Bri-*
 " *tain called Scotland*, as limits the time for killing any muirfowl,
 " partridge, or heathfowl, shall be, and is hereby declared to be,
 " repealed."

The appellants themselves tell your Lordships, that the act the 24th of his late Majesty contains two distinct prohibitions. The one is, That no person shall kill or destroy any muir-fowl from the 1st of
 " January to the 20th of July, or partridges or heathfowl from the
 " 1st of February to the 20th of August." And, 2dly, That no person not qualified shall carry game, or have it in his custody. Now, it will be observed, that the only repealing clause in the statute the 1st of his present Majesty, (the one above recited), relates solely to the first of the two propositions; so that, according to the appellants own showing, the other one, unrepealed, must stand in full force, and have full execution.

4th reason of appeal. The *fourth* reason of appeal is a general declamation against the game-law of this land, ascertaining the qualification of a sportsman at L. 1000 valuation; whereas L. 400 of valued rent qualifies a man to vote, or to be elected a member of parliament.

Answer. The respondents cannot fail to observe how characteristic this reason of appeal is, of those in whose behalf it is framed. A sportsman would have complained loudly to your Lordships, that although possessed of very valuable property, he was debarred the right of hunting even upon his own ground, unless he was possessed of an estate effecting to the large sum of L. 1000 valuation; but these appellants lay the whole burden of their lamentation upon this circumstance, that they are debarred the pleasure of tasting the wing of a muir-fowl.

The respondents will not pretend to say, but that the game-laws may admit of a just rectification in respect of the qualification of a sportsman, so as to make the game upon every man's estate his own property; whereby he would have it in his power to give indulgence to every friend and neighbour upon his own ground, without consideration what was the sportsman's estate: and if the law was upon this footing, every person would be the preserver and guardian of his own game; and no person whatever, who used the right of sporting with discretion, would find it difficult to procure that indulgence from almost any proprietor.

The limitation of the privilege of hunting to those possessed of L. 1000 valuation, crept in altogether by accident. It was indeed intended for the preservation of the game; and the general exclusion from sport, which this part of our law, if rigorously executed, would occasion, is entirely owing to the change of the mode of sporting since the time the act the 1685 was made. Hawking was the ancient method of killing wildfowl in this country; and accordingly the acts of parliament were made for preserving the game, to be killed in the manner practised by the generality of sportsmen; and in order to take sport in this usual and accustomed manner, no
other

other qualification was requisite but a plough-gate of land; that is, every landholder was intitled to take his sport: which was a regulation exceeding reasonable, perhaps more so than any other, unless the legislature should think it proper to adopt the idea of making every man's game his own property. *Vide act 1621, c. 32.*

When the new method of hunting with dogs, and guns, and nets, was introduced, the legislature reckoned those arts amongst the inventions calculated for the destruction of game; and therefore it was thought proper to limit this mode of hunting to those few only who had a valuation of L. 1000, and who should have the express licence of the masters of the game. That this was the real intendment of ascertaining L. 1000 valuation, as necessary for this particular method of hunting with setting dogs, &c. is obvious from the manner in which it is introduced by the act 1685, cap. 20.

“ And further, we, considering, that setting dogs, and other engines
 “ for killing of fowl, is a great cause of the scarcity of game, we
 “ do hereby prohibit and discharge all persons to have or use set-
 “ ting dogs, unless he be an heritor of L. 1000 of valued rent, and
 “ have express licence of the masters of our game, within their feve-
 “ ral bounds, under the pain of 500 merks *toties quoties*, in case of
 “ failzie: And we do hereby discharge all common fowlers, and
 “ fhooters of fowl, or any persons, except they be domestic servants
 “ to noblemen or gentlemen who are heritors of L. 1000 Scots of
 “ valued rent, to have, or make use of setting dogs, or fowling-
 “ pieces, under the pain of escheat of such dogs or guns, and im-
 “ prisonment of their persons for the space of six weeks *toties quo-*
 “ *ties.*”

Thus we see, that from the change of the times in the mode of taking their sports, that regulation which was originally intended for the good of sportsmen, and the preservation of the game, would, if rigorously executed, have the effect of excluding many true and well-intitled sportsmen from game altogether; and it is surprising, that when so many game-laws have been enacted of later times,

this

this circumstance has never been brought under the view of the legislature.

But having observed so much upon the game-laws as they now stand, the respondents cannot give much comfort to these appellants, or administer any cordial to their complaints; for if ever any alteration is made in the law, it will not be in the view of enlarging the practice of buying and felling game in the poultry-market of this or any other city.

The respondents have been led into this digression after the example of the appellants in their reason of appeal: for as to the real merits of this part of their plea, it is certainly a sufficient answer to say, That your Lordships are not called upon as judges to rectify the errors of the law, but to execute the law as it now stands.

5th reason of appeal. The appellants next contend, That the law shows great regard to the case of *bona fide* purchasers in the public market, even with regard to stolen or prohibited goods; and that, in the present case, that *bona fides* was peculiarly strong; for there was a printed table produced, whereby, among other articles of customs payable at the poultry-market, there is at the rate of two pennies Scots charged for every hare, and one shilling Scots for every score of wildfowl; so that it was very extraordinary, that such of the inhabitants as innocently buy what is there publicly to be sold, should nevertheless be subjected in a penalty.

Answer. All this plea of *bona fides* is without foundation, either in point of fact or relevancy.

In the *first* place, The reason assigned in the sheriff's interlocutor is conclusive against the whole of it; for if the practice, as carried on by these appellants, is contrary to law, they will not surely pretend, that the magistrates of Edinburgh have a right either to alter or dispense with the law.

Secondly, Even the printed paper produced of the customs exigible at the poultry-market, does not prove any intention, or found a legal presumption, as if the magistrates of Edinburgh had any such

intention in view. Although the ancient game-laws were more rigorous, and extended the prohibition of buying and selling game even against qualified persons, the law at present is not so rigorous; and therefore, although the magistrates ordained certain customs to be levied upon game at the poultry-market, no fair argument can be drawn from such tolerance, except that the magistrates of Edinburgh meant to exact a custom from game lawfully sold, and brought there, which is already shown not to be the case with regard to these appellants.

Lastly, All this plea of *bona fides* is surely irrelevant to excuse from the payment of statutory penalties, where no excuse of *bona fides* can be admitted. Indeed it may be doubted how far the lenity of the judge in this case is excusable, when he modifies the respective penalties so much below the enactment of the different statutes.

With regard to the parallel endeavoured to be drawn betwixt this case, and the favour which the law shows to *bona fide* purchasers of stolen goods in a public market, there is in fact no similarity: for in the case of stolen or prohibited goods, it is impossible that the purchaser can know the *labes* which attends them; but no unqualified person having game in his custody can plead such ignorance as a lawful excuse, when the general and unlimited prohibition of the act the 24th of his late Majesty must remove every such pretence.

6th reason of appeal. The next defence is founded upon the exception of the statute, which exempts from the penalty such as have the licence of a qualified person; and it is said, that the magistrates of Edinburgh have such qualification, and must be understood to licence the appellants in the practices complained of, by their countenancing the sale of those commodities in a public market.

Answer. The respondents have already taken notice, that the supposed intention imputed to the magistrates of Edinburgh, of tolerating or licensing those abuses amongst unqualified persons, is without foundation. But supposing the magistrates of Edinburgh had granted a licence to these appellants in the most plain and ample form,

form, the respondents deny that such a licence would be any defence.

The magistrates of Edinburgh are not the proprietors of the valuation vested in the community; they are only the representatives of the community; and it is, with submission, a solecism to talk of a community being qualified to kill game. It is a qualification which, in common sense and language, can only belong to and be exercised by individuals. Accordingly, every act of parliament mentioning the qualification, talks of *men* or *persons*; but it never falls into the absurdity of talking of a community hunting, hawking, or shooting. The act 1621, cap. 31. says, "No *man* hunt or hawk at any time hereafter, who hath not a plough of land in heritage, under the pain of an hundred pounds." In like manner, the act 24th of his late Majesty, says, "That *no person whatever*, not qualified to kill game in Scotland, shall have in *his* or *her* custody, or carry at any time of the year," &c. And at the end of the same clause, it says, "That in case of insolvency, the party offending shall suffer imprisonment for the space of six weeks for the first offence, and for the space of three months for the second, and every other subsequent offence." All this mode of expression is perfectly incompatible with the idea of a qualification pertaining to a community. And the same observation does likewise apply to the expression of the act 1685, cap. 20. which introduces the valuation of L. 1000 of valued rent as requisite for certain modes of hunting. The words are, "We do hereby prohibit and discharge all *persons* to have or use setting-dogs, unless *he* be an *heritor* of L. 1000 of valued rent, and have express licence of the masters of our game, within their several bounds, under the pain of 500 merks *toties quoties*, in case of failzie: and we do hereby discharge all common fowlers, and shooters of fowl, or any persons, except they be domestic servants to *noblemen* or *gentlemen* who are heritors of L. 1000 Scots of valued rent, to have or make use of setting-dogs or fowling-pieces, under the pain of escheat of such dogs or guns,

“ and imprisonment of their persons for the space of six weeks *toties*
“ *quoties*.”

This plea is not unlike that which was set up by the town of Paisley, who claimed a vote for the election of a member of parliament; but your Lordships will remember what was the fate of this plea in the court of session, when the right of this borough was brought under challenge at the instance of Sir Michael Stewart, upon the 6th March 1760.

7th reason of appeal. The appellants plead, That the respondents are barred *personali exceptione* from insisting upon the penalties in question; because upon the passing of the act of the 1st of his present Majesty, which prohibits all persons to kill, carry, sell, buy, or use game, within the time therein mentioned, an advertisement was published, setting forth, that those who offended were to be prosecuted; but taking no notice of the former act of the 24th being still in force; whereby the appellants were led to believe, that they were in safety, provided they did not offend against the latter statute.

Answer. This plea shall be left with your Lordships, without much argument. Upon the passing of a new act respecting the game, namely, the time allowed for killing the same, one of the respondents, then procurator-fiscal of court, published an advertisement, putting the lieges upon their guard, not to offend against this prohibition. But will the appellants pretend to say, that there was one word in that advertisement, which insinuated that the former game-laws were repealed? And as the advertisement gives no such information, there was surely as little ground in common sense to infer, that because the legislature had thought proper to alter the close or prohibited time for killing game, it therefore meant to repeal the whole game-laws; which is the purport of the appellants argument.

Last reason of appeal. It is, in the last place, objected against the sheriff's judgement, That he has manifestly exceeded the powers given him by the statute; for that the penalty for the first offence is only

only 20 s. Sterling; whereas some are fined in L. 2 others in L. 3 Sterling each.

Answer. It is believed this reason of appeal proceeds upon a mistake; for if the appellants will look at the acknowledgements of those upon whom the penalties of L. 2 or L. 3 are inflicted, they will find they have been much more guilty than in one offence.

So far with regard to the reasons of appeal exhibited on the part of one set of appellants, namely, the vintners of this city. The respondents did next propose to have considered the case of the other appellants, namely, the poultrymen: but upon comparing the reasons of appeal lodged in their behalf, together with the observations which have been offered, the respondents conceive the argument to be already exhausted; and therefore they shall only offer one observation upon the poultrymen in particular, That their case, so far as concerns their *bona fides*, is still more unfavourable than that of the other appellants, unless they shall be able to condescend, and say, that the game which they exposed for sale in the public market, was procured in any other way but from those common carriers and poachers, whom they themselves are at so much pains to point at as the persons specially meant and enacted against in the various statutes above mentioned.

Upon the whole, although the respondents flatter themselves, that the judgement complained of is well founded; yet they are not dissatisfied, that this appeal has been brought against it. It is clear, that if the game-laws stand upon the footing contended for by the appellants, they are altogether ineffectual for any purpose whatever. The judgement of your Lordships will satisfy the country, either one way or another; and if the game-laws are in such a state, as that they cannot be executed with effect, then the gentlemen of property in the country may take such measures as they think proper for procuring a law productive of effectual regulations for the preservation of the game, so early and anxiously attended to by the legislature at all periods."

The

The court affirmed the judgement of the sheriff, and dismissed the appeal.

The defenders afterwards obtained licences from different gentlemen; but these not being thought sufficient, they were again sued; and the sheriff having again given judgement against them, a petition of appeal was presented, and served.

This petition sets out with observing, "When the late question, regarding the prohibition of game, was before your Lordships, it was argued with great warmth upon the part of the complainers, That the strict execution of the game-acts ought to be a favourite object of the law; and that it was the duty of every judge that they should be observed in every particular with the greatest exactness. It was said, That in these days of luxury and ease, that nothing but the spirit of the chace could preserve the gentlemen in this country from falling into a state of contemptible effeminacy; that our ancestors, though more hardy than we, had viewed the sports of the field in this light; and that they were absolutely necessary to support the character of a martial and warlike people.

Answer. The appellants cannot join in these high encomiums upon our game-laws; and in their humble opinion, there is no part of the statute-book which deserves so little a liberal interpretation. That they are an incroachment upon the law of nature, cannot be denied. It is laid down in many places of the Roman law, *Inst. lib. 2. tit. 1. § 12.* "Feræ bestiæ et volucres, et omnia animalia, quæ mari, cælo, "ët terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id "naturali ratione occupanti conceditur."

It is equally clear, that our game-laws run absolutely counter to all the principles of property which take place in our happy constitution.—A proprietor of land who has not L. 1000 Scots of valued rent, that is, in some places in Scotland, near L. 1000 Sterling a-year, and more than double the qualification necessary for being elected

lected a member of parliament, not only dare not amuse himself in hunting the game produced and supported upon his own estate, but he must tamely submit to see a more opulent proprietor pursue that game to his door, and insult over his subjection.

It would require very beneficial consequences to sweeten such bitter draughts.—If we examine the origin of the game-laws, they did not spring from a source which diffused many advantages to mankind. They were first invented by the barbarians who over-run the Roman empire, and who substituted ignorance and devastation in the place of useful arts and cultivation.

These barbarians, illiterate as they were, were not so short-sighted as to imagine, that these institutions could contribute to keep up the warlike spirit of the nation; on the contrary, the laws which they enacted for the preservation (as they called it) of game, were clearly founded upon the principles of slavery and subjection. As they feared the numbers and resentment of their new subjects, it became necessary to disarm them; and nothing could do this so effectually as a prohibition from any one's following the sports of the field, except those who had a licence from the general or king; and accordingly we find in the Feudal constitutions, *lib. 2. tit. 27. § 5.* that the same law which prohibited the *russici* in general from carrying arms, also forbid the use of engines for destroying the game.

Even to the person who is accustomed to the sport, there does not seem to be much connection between hunting and war; nor does the pursuit of a timid hare appear a necessary education for the attacking a dangerous enemy. The great names of antiquity were not sportsmen; and the Romans conquered the world without a single game-law.

But even upon the supposition, that nothing more was necessary to make a complete soldier than a campaign or two against hares, foxes, and muir-fowl, our game-laws are clearly destructive of the martial spirit of the nation in general. An army of the landholders between sixteen and sixty, of L. 1000 valued rent, would not make a great figure against a foreign invader; and the spirit of our game-laws

laws seems to intend, that no other persons shall be able to draw the trigger of a gun. The legislature has thought proper to disarm the half of our country, and not to indulge the rest with the advantage of a militia. An extensive interpretation of the game-laws would clearly have the effect to put the south side of the Forth in the same situation to which the north side would have been reduced by a rigorous execution of the disarming act.

It appears from experience, that the rigorous execution of game-laws is incompatible with liberty. They were introduced by the Normans in England to keep the old Saxons in subjection; and in the days of Henry III. the immunities of *Charta de foresta* were as warmly contested for, and extorted from the King with as much difficulty as those of *Magna Charta* itself.

In our days game-laws are enforced with rigour in France, and some of the despotic principalities of Germany; but in Switzerland and Holland there are no such laws, and in England they are very gently executed.

It appears likewise from experience, that the aristocratical principle of confining the chase and consumption of game to a few, has not even the trivial effect of multiplying those animals whose race is intended to be preserved. A single hawk destroys more game than twenty poachers, and there is hardly a poacher who does not destroy twenty hawks in a year; and the farmer who is prohibited from fowling, consumes in the egg ten times the quantity of game which would afford him sport, if he was intitled to it by law.

With all deference, therefore, there does not seem to be any part of our law which requires a stricter interpretation than the acts regarding the game, the good effects of which must be perfectly trivial, and the bad consequences prejudicial in a high degree, if they should be improperly extended."

At. Henry Dundas.

Alt. Rae, Ferguson.

The procurators-fiscal, chusing to drop the process, put in no answers to this petition.

N^o 84.

December 1769.

ARCHIBALD Earl of EGLINTOUN, and his Majesty's Advocate,

A G A I N S T

MUNGO CAMPBELL, late Officer of Excise.

It is murder to kill in defence of a fowling-piece, which another advances to seize, not from a felonious intention, but a mistaken notion, that he has a right to take it; nor is it sufficient to excuse, or mitigate, that the slayer retired before the aggressor, and did not fire till he fell.—Challenges to jurors.—Suicide.

THE indictment charged, "That where, by the law of God, and the laws of this and every other well-governed realm, murder, or the feloniously bereaving any of his Majesty's subjects of their lives, is a most atrocious crime, and severely punishable; yet true it is and of verity, that you, the said Mungo Campbell, have presumed to commit, and are guilty, actor, or art and part, of the said crime; in so far as the deceased Alexander Earl of Eglintoun having, upon the 24th day of October, in this present year 1769, or upon one or other of the days of that month, or of the month of September preceding, or November following, gone out from his house of Eglintoun, in the county of Air, in his coach, to look at some of his grounds; and being told by one of his servants, when upon the road from Saltcoats to Southennan, within the parish of Ardrossan, and said county of Air, that he observed two persons, one of them with a gun, at a small distance, upon his Lordship's ground of Ardrossan; the said deceased Earl (who, by an advertisement in the news-papers, had forbid all unqualified persons to kill game within his estate) came out of his coach, unarmed, and mounted a horse which was led by his servant; and, leaving in his coach an unloaded gun, he rode towards the two persons, who, in the mean time, went off the Earl's grounds of Ardrossan into the

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adjacent

adjacent sands; and he having come near to the two persons on the said sands, and discovering the one with the gun to be you the said Mungo Campbell, he accosted you, by saying, Mr Campbell, I did not expect to have found you so soon upon my grounds, after the promise you made me when I last caught you, when you had shot a hare; and the Earl having thereupon desired you to deliver your gun to him, you refused so to do; and upon the Earl's approaching towards you, you cocked your gun, and presented, or pointed it at him: and upon the Earl's then saying, Sir, will you shoot me? you answered, That you would, if his Lordship did not keep off: to which the Earl replied, That if he had his gun he could shoot pretty well too, or used words to that import; and desired his servant to bring his gun from his coach, which was then at some distance; and the Earl having dismounted, and walked towards you, leading his horse in his hand, (without arms, or offensive weapons of any kind), you retired, or stepped backwards, as he approached, and continued to point your gun at him, desiring his Lordship again to keep off, or, by God, you would shoot him: and a servant, near to the Earl, having begged of you, for God's sake, to deliver your gun, you again refused, saying, you had a right to carry a gun: to which Lord Eglintoun answered, That you might have a right to carry a gun, but not upon his estate without his liberty; but you still persisted in refusing to deliver your gun; and by striking your foot against a small stone, having fallen upon your back when retiring, and keeping your gun pointed at Lord Eglintoun, as above described, the muzzle of the gun came thereby to be altered in the direction from Lord Eglintoun, and to be pointed near straight upwards; and Lord Eglintoun, who was only distant from you two or three yards, having stopped, or stood still, upon your falling, you, as soon as you could, recovered yourself, and resting upon your arm or elbow, aimed, or pointed your gun, to the said Alexander Earl of Eglintoun, and wickedly and feloniously fired it at him, then standing unarmed, smiling at your accidental fall, and by the shot he was wounded in the belly in a dreadful manner, the whole lead-
shot

shot in the gun having been thrown into his bowels; of which wound the said Alexander Earl of Eglintoun died that night about twelve o'clock. And you the said Mungo Campbell, after perpetrating so cruel, wicked, and barbarous a crime, did immediately run to one of Lord Eglintoun's servants, who had brought his gun from his coach, and who was standing at some distance, and endeavoured to wrest the gun from him, but was prevented by the assistance of another servant; and when the two servants were engaged with you defending the gun, and endeavouring to secure you, the Earl, who was then sitting on the ground, called to the servants to "secure the man, for he had shot him, but not to use him ill," or used words to that purpose and effect; and upon your being brought near to Lord Eglintoun, he said to yourself, "Campbell, I would not have shot you." And you the said Mungo Campbell, when carrying from the place where you committed the foresaid crime to Saltcoats and Irvine, did acknowledge to sundry persons, that you had wilfully and intentionally shot the said Alexander Earl of Eglintoun. And the said Alexander Earl of Eglintoun, when within two or three hours of his death, in giving an account to John Moor surgeon in Glasgow, who was called to give what assistance he could in the way of his profession, of what had passed between you and him, did in substance say, that you, the said Mungo Campbell, did take an aim at him, and shot him wilfully; and which account of the matter was given by the said Alexander Earl of Eglintoun with the greatest calmness and composure. And you the said Mungo Campbell, having been brought before Charles Hamilton of Craighlaw, Esq; a justice of peace of the county of Air, upon the said 24th day of October 1769; and thereafter before William Duff, Esq; sheriff-depute of the county of Air, upon the 27th day of the said month of October; you did voluntarily emit two declarations, which were subscribed by you, and will be used in evidence against you upon your trial: and for that purpose, both declarations shall be lodged in the hands of the clerk of the court of judiciary, before which you are to be tried, that you may see the same. At least, at

the time and place above described, the said Alexander Earl of Eglington was feloniously murdered, or bereaved of his life, by a wound he received from the shot of a gun, and of which wound he died in about twelve hours, or some short space thereafter; and you the said Mungo Campbell was actor, or art and part, of the said murder. All which," &c.

After Mr Campbell was brought to the bar, and the indictment read, but before he was asked what he had to say to it, the court started a doubt as to their jurisdiction, it appearing from the indictment, that the fact which gave rise to it happened on the sands or shore of the sea; and therefore, perhaps the court of admiralty was the proper court to try this case: and the Lord Advocate having admitted that the fact happened within flood-mark, the court desired to hear counsel upon the point of jurisdiction.

This doubt had occurred to the counsel for the prisoner; but as they could not perceive any advantage he would reap from being tried before the Admiral, they had resolved not to decline the court of justiciary; yet upon the court signifying an inclination to hear them on the question of jurisdiction, they complied. Minutes of debate were then ordered to be made up.

The court, Dec. 22. 1769, met to determine the question of jurisdiction; and all the judges but one were of opinion, the court had a jurisdiction in this case.

It was proposed, some days after this, that the prisoner should appeal from the judgement sustaining the jurisdiction. Some of his counsel doubted, for several reasons, of the propriety of this step: however, a petition was presented. Upon this it was ordered, January 22. 1770, "by the Lords spiritual and temporal, in parliament assembled, That the said appeal be referred to a committee, "to consider whether the same be properly brought; their Lordships, "or any five of them, to meet on this day seven-night, and to report their opinion thereupon to the House."

Afterwards the agent for the appellant was called in, and asked, whether he was ready to go on? To which he answered in the negative,

gative, not having as yet got the extract, and other necessary papers, though he expected to be possessed of them in a few days. Upon this the appeal was dismissed.

Immediately after the court of Justiciary had sustained their jurisdiction in this case, the indictment was again read, (Dec. 22.), and the prisoner was asked, What he had to say to it, whether Guilty, or, Not guilty? Upon which he answered, with some emotion, "No; my soul abhors the thoughts of it." Then long pleadings followed on the relevancy.

The court did not determine upon the hearing, but ordered informations; which were prepared accordingly; that for the prosecutors by Mr Macqueen, Jan. 3. 1770; that for the prisoner by Mr Maclaurin, Jan. 22. 1770. As the trial has been twice printed, it would be improper to insert them.

From the English law-books and reports, there seemed to be great reason for thinking, that in England this would be reckoned a case of manslaughter; however, to get more light as to this, it was resolved to lay the indictment before English counsel. The then recorder of London was first consulted: The case laid before him, and his opinion upon it, are as follows.

In the court of Justiciary in Scotland,

Archibald Earl of Eglintoun, and the Lord Advocate of } Prosecutors;
Scotland on behalf of his Majesty,

Mungo Campbell, charged with the murder of the late } Defendant.
Earl of Eglintoun,

Mr Recorder's opinion is desired on behalf of Mr Campbell upon the relevancy of the indictment against him, a printed copy whereof

is hereunto annexed, Whether he thinks the charge, if proved, would, in the law of England, be held a murder, punishable with death? or manslaughter, and how punishable? or a homicide *se defendendo*, not punishable at all?

O P I N I O N.

This is a question of too much difficulty and importance to receive a determinate answer within the very short time which has been allowed to me for the consideration of it. It seems to me, that, according to the law of England, this question would turn very much upon the question, Whether Lord Eglintoun could lawfully seize Mr Campbell's gun in that place where the wound was given? And this would depend upon the question, Whether the place was within Lord Eglintoun's manor? or, if not within his manor, Whether within a county where Lord Eglintoun was a justice of peace?—It would further depend on the question, Whether Mr Campbell was a qualified man? or, (according to a late case upon the game-laws), though not generally qualified, Whether he had any other right to carry a gun which would bar the right of seizing, even though he was in the very act of trespassing upon Lord Eglintoun's grounds, or of using his gun for the destruction of the game?

Supposing it to be once settled, that Lord Eglintoun could lawfully seize Mr Campbell's gun, I am strongly inclined to think, that the case, as stated in this indictment, would amount to murder, and as such to an offence punishable with death. If, on the contrary, it should be established, that Lord Eglintoun had not an authority to seize Mr Campbell's gun, it would then become a question, Whether this homicide is capable of mitigation, upon the ground of having been committed upon the defence of Mr Campbell's person, in resisting an unlawful attack upon him, or in warding off imminent danger to himself. The case stated in the indictment proves, that Lord Eglintoun intended to take Mr Campbell's gun from him; but it does not appear, that he had done any thing in the prosecution

fecution of that intent which in our law would amount to an assault upon Mr Campbell. This appears to me to be the critical part of Mr Campbell's case. It is not stated at what distance Lord Eglintoun's gun was when Mr Campbell fired. If it should be made appear, that the gun was brought so near to Lord Eglintoun, (who had declared he too could shoot, and was prosecuting an unlawful intent), as in the opinion of a jury to put Mr Campbell, who was then upon the ground, in imminent danger, there would be room to insist, that by the law of England the shooting at and killing Lord Eglintoun, under the sudden impulse of such grounded apprehensions of imminent danger from Lord Eglintoun, would amount to manslaughter only; which by the law of England is punishable, being the first offence, by branding in the hand, and by imprisonment for any space of time not exceeding one year, at the discretion of the court.

Lincoln's-Inn Fields,

Jan. 18. 1770.

Afterwards the informations were laid before the Recorder, and also before the Attorney General, who gave the following opinions.

Mr RECORDER's Second Opinion.

I have perused the indictment preferred against Mungo Campbell and also the draught of an indictment annexed to the informations on behalf of Mr Campbell; and it appears to me, that according to the law of England, the question proposed to me would turn very much upon the question, Whether Lord Eglintoun could lawfully seize Mr Campbell's gun in that place where the wound was given? and this would depend upon the question, Whether the place was within Lord Eglintoun's manor? or, if not within his manor, Whether within a county where Lord Eglintoun was a justice of peace? It would further depend on a question, Whether Mr Campbell was a qualified man?

man? or, (according to a late case upon the game-laws), though not generally qualified, Whether he had any other right to carry a gun, which would bar the right of seizing, even though he was in the very act of trespassing upon Lord Eglintoun's ground, or of using his gun for the destruction of the game? Supposing it to be once settled, that Lord Eglintoun could lawfully seize Mr Campbell's gun, I am strongly inclined to think, that the case, as stated in either of these indictments, would amount to murder.

On the contrary, supposing it to be settled, that Lord Eglintoun had not an authority to seize Mr Campbell's gun, I am of opinion, that the case, as stated upon either of these forms of indictments, would, by the law of England, amount to manslaughter only.

In discussing such a question it is obvious, that all consideration of the rank and character of the parties must be laid aside.

Lord Eglintoun's primary intent seems to have been, simply to seize Mr Campbell's gun, and he might conceive that he had a right so to do; but it was unlawful to do it: and it is to be considered, that he could not do it without committing an assault upon Mr Campbell's person, as well as a trespass upon his property, his property being then under the protection of his person.

It appears upon the face of both indictments, that Lord Eglintoun, after demanding Mr Campbell's gun, advanced upon him: it is not stated for what purpose; but an English jury, in finding the facts of the case, would doubtless infer from the evidence, that he advanced in order to seize the gun. This would, by the law of England, amount to an assault upon Mr Campbell's person, though Lord Eglintoun should not have actually touched him.

In this view of the case, the question is not therefore simply, Whether, by the law of England, a trespass attempted upon the property of another, will excuse or mitigate a homicide upon the trespasser? but, Whether an assault upon a man's person in order to commit a trespass upon his property, will excuse or mitigate such an homicide?

And I conceive, that it might be maintained, if the case required it,

it, that, by the law of England, such an assault would mitigate, though not excuse such an homicide.

But this case does not rest here: The Lord Eglintoun's primary intent was, to do that which amounted to trespass only. His declaring, that if he had his gun, he could shoot pretty well, and his sending his servant for his gun, prove, that he was determined to execute his primary intention by force, and in opposition to all the resistance which Mr Campbell, who had a loaded gun in his hand, could make.

Lord Chief Justice Hale, a very eminent and approved writer upon the English criminal law, in his History of the Pleas of the Crown, p. 456. states it as having been agreed by all the judges, in the case of Lord Morely, that words of menace of bodily harm would come within the reason of such a provocation as would make the offence to be but manslaughter. Here was more; for the words of menace were followed by an act tending to carry them into execution. If Mr Campbell had fired immediately, it seems, therefore, that it could have been no more than manslaughter: but he retired till he fell; Lord Eglintoun was then within two or three yards of him; his servant was at some distance with his gun, which he had sent for; Mr Campbell on the ground, unable to retire further, in a posture unfit for resistance, or for combat upon equal terms, gives the mortal wound. Such a combination of circumstances afford, in my apprehension, very strong legal grounds of provocation to reduce the homicide to manslaughter, and indeed bring the case almost to a case of self-defence; for if Lord Eglintoun had had a loaded gun in his hand when Mr Campbell fired, I should have been clearly of opinion, that it would have been a case of self-defence.

Lincoln's-Inn Fields,

Jan. 31. 1770.

After perusing the indictment preferred against Mr Campbell, and also the draught of an indictment annexed to the information on the behalf of Mr Campbell, and also the copy of an opinion of Mr Recorder 31st of January last,

Mr Attorney-General's opinion is desired on behalf of Mr Campbell upon the whole, and whether he does not agree and concur with Mr Recorder's opinion.

Mr ATTORNEY'S Opinion.

Taking it for granted, that the late Lord Eglintoun had no right to seize the gun, and that the facts stated in Mr Campbell's case are true, I am of opinion, that if this unfortunate homicide had happened in England, the crime, by the law of England, would have amounted only to manslaughter, and would not have been punished as a capital offence. Lord Eglintoun having declared an intention to take away the gun, his having advanced upon Campbell in execution of his purpose, and the agitation of Campbell's mind, probably occasioned by his fall, and the apprehension he might have of the consequences of it; these circumstances would, I think, give room to suppose he acted from the sudden impulse of his situation, and not from an unprovoked and deliberate purpose.

But I do not think that the facts would make it a justifiable homicide in defence of his person or property; especially as Lord Eglintoun did not continue to advance upon him after his fall, but, by his countenance and pausing, shewed no immediate design upon either.

February 20. 1770.

On the 22d January 1770, the court gave their opinions on the relevancy. Of these a note was taken as follows: but it is imperfect; nor can it be understood without having read the informations.

AUCHINLECK. Case stripped of extraneous arguments comes to a narrow issue.—Murder the crime; and that to be tried by the law of Scotland:—too often committed in this country to be a question what it is by our law.—The laws of other countries very imperfectly known to us.—Of no use except when our own law silent.

—When

—When we have a law of our own, that must be our directory.—Charge in the indictment.—If the shot accidental, it will be a casual homicide; and that to be hoped for the sake of the pannel.—But if not, murder.

Defence of the prisoner *chaud melle*; that is, he was in a passion; for it comes to that, stripped of specious arguments.

Lord Eglintoun's attack not like that of a robber.—Lawful to kill a robber.—The person who made the attack Lord Eglintoun.—Wanted the pannel to give up his gun; because he had no title to carry one on his estate.—No felonious intention to rob the pannel.—This he knew.—Might have got back his gun by a prosecution.

Told in the information, that we should lay aside distinction of persons.—The circumstances of persons must enter into the argument.—The difference of persons very great.—If a mean man should come up to a nobleman, and demand his gun, the person attacked would with reason look on him who attacked, as a person who wanted to rob or murder.—Lord Eglintoun known to have a great estate; and the pannel knew this; and that he had no felonious intention.

As to the law of England,—if it was to enter into this argument, then the statute there would fall to be considered, as it allows a seizure of the gun.

Point of honour.—Dishonourable to fire on Lord Eglintoun unarmed.

As to the defence of *chaud melle*, i. e. that he was in a passion; well observed in the information for the pannel, that the Scotch nation hot: and this heat has often been usefully employed; but it requires to be kept within bounds.—An irascible man, at this rate, might commit murder as often as he pleased, and plead he had been in a passion.—Business of the legislature to restrain the passions. If we had no law that did this, we should have one.—Law of God, "Whoever sheds man's blood," &c.—The *lex talionis*, Eye for an eye, &c.

Practice of this court.—The act 1661 has laid down the cases in which the killer shall escape punishment; but none of them apply to this.

Would not narrow the pannel in the proof, and therefore not for repelling the defences, but allow him to prove all facts and circumstances.

KAMES. Information for the pannel mistated the argument, and darkened it with artificial reasoning.

Provoking words not sufficient to take away a man's life.—Must say you was in hazard.

Property.—True in general that we may defend property; but don't apply to this case.—If a man attacks my house in the night, common sense says, I am intitled to kill him; for I have good reason to think my life in danger: but if a man lays hold of my horse, and says, it is wrongously in my possession, I cannot kill, but must go before a judge with him.

If any doubt in the law of Scotland, that of England would have weight.—Anciently intention not regarded.—Enough a man was killed.—Every killer might be put to death.—Avenger of blood when no courts of justice.—But in a refined state of society, intention or not intention is the cardinal point.—Where provocation or alleviation, the King can pardon.

Law of England.—Anciently every man who killed another, guilty of a capital crime.—Statute Henry III. saved killers without intention.—Went on after, without any distinction betwixt murder and manslaughter, till days of Henry VIII.—Before that, clergy only distinguished.—So laying aside clergy, with which we have no concern, the law of England the same with ours.

No law anciently in this country that relieved a man who kills another, even innocently.—Same as the Jewish law.—Before the act 1661, casual homicide no defence.—Even homicide in self-defence was not excused altogether; so that every body who hears me, will understand the question is, Intention, or Not intention.

There is an act, Ja. I. in England, called *the statute of stabbing*, which very near this case, substituting *sword* for *gun*.—This law enacts, That if two men squabble, and one of them kills the other, girt with a sword, but before he draws, it is murder.

PITFOUR. Argument fully stated in the papers; and therefore will
barely

barely give his opinion.—There can be no doubt of the relevancy, (words of the libel as to the firing); so murder plainly libelled, as the gun fired when it could not possibly miss.

The libel may admit of defences; if the pannel could say, he was *in periculo*, the killing lawful.

First defence, property, honour, and life.

Second, provocation.

First, Lawful defence good to exoner a pannel, where-ever a man is *in periculo*, &c. in danger of a loss that is irreverfible and irremediable, so not bound to resort to law.—The law of the country allows the law of nature to take place.

The law however pries into this defence narrowly.—Necessary that no other means of escaping.—Strange defence, That a man will kill rather than lose a gun, a snuff-box.—Nothing in the argument, that this moveable could not be recovered, as it might have been destroyed.—This inconsistent with the law of every country, which enacts, That even danger to life not sufficient, if another way to escape.

The aggressor able to repair 100,000 fold.—The opinions of authors nothing here: they speak of the state of nature; where there is no judge, no superior law to protect.—But Civil law supercedes this.

In scuffles people often killed without an intention.—Instance in this court, case of Archibald, (See N^o 81.).—Court clear, that the provocation there would not have sufficed, had he used a lethal weapon.—He did not use a lethal weapon, but only his fist; so no intention to kill, and the case given up by the Solicitor.—Here can be no doubt of the intention.

As to the argument, That it is lawful to kill a robber in defence of property.—The property not the reason; but, first, the robber *in felonia*; and, secondly, my own life in danger.

Don't enter into the question, Whether it was lawful for Lord Eglintoun to seize the gun, or not?—It would be unworthy to do so.—He will suppose it was unlawful.

All the argument comes to this, That he was in passion; and therefore

therefore justified to kill him who had improperly put him in a passion.—At this rate, every man who put himself into a passion, may kill others safely.—It is proper, that the jury may not be misled by artificial defences, to give our opinion as to the law.—If we differ in opinion, the jury will judge themselves; if we agree, it will have great weight.—It has so in all countries.

Slaughter capital by the 1st of Alexander, &c.—Theft capital too; and absurd in the law to annex death to the eighth command, and not to the 6th.

If we go up to the origin of our law before the church made her incroachments :

What is the source of the acts of James?—Very bad; the incroachment of the church.—When a criminal got into a church, protected.—The church gave up murder.—They were ashamed of that: but as to murder upon suddeny, that still was privileged.—This distinction founded on an unlawful privilege; but now we are free of that tyranny, and the privilege gone.

The case of England different.—There the personal privilege did not depend on going to a church.—With us no personal privilege.—Sir George Mackenzie, in his Observations, and elsewhere, says, slaughter on suddeny is capital.—This too after the girth abolished.—No lawyer has contradicted him.—Decisions.

Persuaded, that this *species facti* would not be manslaughter in England: but this foreign.

COALSTON. This law makes no distinction of persons; and so Lord Eglintoun's rank and quality to be laid aside, and the prisoner to be considered as trying for the life of the meanest subject.—This case of importance in point of precedent.

Homicide may be attended with such circumstances as relevant to restrict. Act 1661 mentions some cases; but there may be others. It don't mention a woman killing in defence of her chastity, or a husband for adultery.

As to the homicide being of suddeny, a felonious intention must be

be proved; but such intention not necessary for a distance of time: which *antecedit ictum licet non congressum*.

Second, provocation.—Has no doubt that provocation might be given sufficient to exempt from the ordinary punishment.—Case of Finhaven.—That case don't apply; nor does any of those quoted for the prisoner. In all these cases there was a real injury; but none here.

Last defence.—Lawful to repel force by force; and so lawful to defend property if attacked.—Don't think he was obliged to surrender. He might defend it; but it don't follow he might kill him.—Don't appear that Lord Eglintoun had an intention to seize it; rather the other way.—As to the sending for the gun, shews he did not mean to use violence at least till the gun was brought.—His leading his horse in one hand, at first shews he did not then mean violence.—Real evidence he did not mean to seize it: if he had, he would have done it when the prisoner fell.—Whatever his intention, he had done nothing to carry it into execution.—Had the prisoner waited till a scuffle, by the law of England it would have been manslaughter: and though we don't know such distinction, yet he would have been intitled to plead provocation, had he done it in a tuilzie; but as he did, it was a murder.—Cases for the prisoner, when property feloniously invaded.

Dangerous consequences if this court should pronounce a judgement, giving sanction to an opinion, that one may kill another who seizes his property from an erroneous apprehension.

Question put by the counsel for the prisoner, What would you have done?—This proper.—Don't blame the pannel for refusing his gun; he had a right to keep it: but in answer to the question, every man who had a just sense of honour, would not have shot, till Lord Eglintoun was possessed of his too: would not have done it till an attack made upon him.

KENNET. In England, one fifth of the time would have determined this case.

If an intention to kill before the shot went off, it is murder.—This too the law of England;—the law of common sense.—High provocation.

cation will excuse a *pena ordinaria*. Common example of adultery, and one judgement at least, in this court, finding so. It must be such provocation as will affect human nature, not what will affect a choleric man.—The severity of the game-laws improperly brought in.—Don't much approve of them.—What is said in the information for the pannel, as to Scottish aristocracy, improper.—The same laws in England.—They are improper in some cases, particularly with regard to small proprietors.

As to defence of goods.—Lord Eglintoun did intend to take the gun; and the pannel was intitled to resist to a certain degree.

A fellow-citizen who is going to do a wrong thing, to commit a spuilzie, is not to be slain.—Breaking an orchard perhaps won't justify beating.—This gun cried up like the shields of the Spartans, *Aut hoc aut super hoc*.

Honour is a sacred thing.—Defence of what a man thinks his honour, or what really is a piece of pride, won't allow to kill.—Grotius, even for a blow, don't allow killing.

The pannel said, His soul abhorred the action.—Hope it will appear so on proof.

No distinction of ranks as to life or goods; but there is as to honour.—Had the pannel had a small property, and demanded Lord Eglintoun's gun, there the insult would have been greater; but still, in his opinion, Lord Eglintoun not intitled to shoot him.

As to self-defence, must be *in periculo*.—Lord Eglintoun unarmed, the gun not come, the pannel had another way of escaping; for he might have given up his gun, and then he was in no danger; so it comes back to this, Whether he could kill in defence of his gun?

JUSTICE-CLERK. If the gun went off by accident, it was casual homicide.

Various degrees of guilt in the crime of murder.—Won't dip into the laws of other nations.—The prisoner to be judged by the laws of his own country.—The subjects of this country have reason to be satisfied with their own laws.—Many actions are felonies in England which are not so here.—Treaty of union secures to us our own laws; and

and though they were erroneous, must bind this court.—At same time, the law of England would not serve the prisoner, could see none of the authorities that applied.—Homicide from intention, though secret, murder.—We not obliged to say, that in every case we would have determined in the way and manner it has been; but the strain of all the cases, both before 1661 and after, imports, that homicide from intention, though not antecedent for a long time, is murder.—Act 1661, Sir George Mackenzie says, the title inaccurate.—Casual murder don't take in the case of murder committed from intention.—The argument for the pannel here new, and never stated before.—The act says, its purpose to remove all doubts.—The act pointed and accurate.—Odd if not one word thrown in to shew, *homicidium in rixa* was meant to be exeemed from death.—The word *casual*, in common sense, don't comprehend it.

As to verbal provocation, says nothing, as the libel states nothing like it.—Provocation taken notice of by writers.—Though the pannel, was conscious that he had not been seeking a hare that day, yet he, from what had passed before, should not have resented so much.—The words of *rascal* and *scoundrel* are provoking, if proved.—Every man in a fit of passion will use words to a servant that he would not use to his equal; but though *rascal* and *scoundrel* proved, not sufficient.—The demand of the gun falls more properly under the second defence.

Second defence, life.—Neither libel or defence present an idea that he thought, or could think, his life in danger.—Had Lord Eglintoun taken his gun into his hand, the case would have been totally different.—His honour.—Where was the wound to his honour, that Lord Eglintoun, attended by a number of servants, should take his gun?—If it was a *macula* on him, is it possible such an attack would justify an intentional homicide?

Property. Most hazardous this defence to the security of the subject.—It is clear, that though Lord Eglintoun under a mistake about the act 1707, yet it was but a trespass, not a felony, or a robbery; against which law gave a remedy.—In a case before the court

of session, it bore an argument.—One decision don't fix the law; and the influence of that decision has not extended itself so, but that gentlemen *bona fide* believe they have a right to take the gun.—By the law of England, the lord of the manor has a right to seize the gun.—The pannel's argument don't distinguish between small and great property.—Lord Eglintoun had a *coloratus titulus*.—Consequences :— A thousand instances must occur every-day as to poindings, removings.—If the subjects may arm themselves, and kill one another on such pretences, the country would be in a miserable situation.—Lord Eglintoun well known to the prisoner; he was law-biding.

The libel was therefore found relevant, and the prisoner allowed to prove all facts and circumstances in common form; and the 5th of February fixed for the trial.

As I was counsel for the prisoner, upon these opinions I shall only observe, that they take no notice of the prisoner's retreat and fall before he fired, which are unquestionably very strong circumstances for him; and on account of these, many sensible men, and some very good lawyers, hold, that this was a case of *manslaughter*.

Extracts and other papers being got ready, a second petition of appeal was presented. The account of the procedure upon it, contained in the following memorandum, may, it is believed, be depended upon.

“ The appeal was moved by a Noble Lord, with an explanation, that it had been put into his hands; and he laid it before the House, merely as a point of duty, without entering further into the merits.

The appeal was then read.

After which, Lord M. moved, that the agent should be called in. Which having been done accordingly,

Lord M. asked him, Whether he had any precedents to lay before the House of appeals to the parliament of Scotland before the Union, or to this House since, against interlocutory orders of the supreme criminal

criminal court in Scotland, made in the course of the hearing, and before final judgement?

To which the agent answered, *That he had not.*

He was then asked, If he knew of any such instances?

He replied, He did not: That not foreseeing such authorities to be necessary, he did not make any searches or inquiries.

On which it was put to him, Whether he would now withdraw his appeal, until he could inform himself of the course of the practice and precedents?

He said, He was entirely under the direction of their Lordships. But being then acquainted, That he must make his option, and either withdraw the appeal, or, for his client, submit to such order as the House should think proper to make thereupon, in consequence of his insisting for the same; he declared, That as the instructions to him were to present the appeal, he must submit the same to the judgement of the House.

Whereupon he was ordered to withdraw. After which Lord M. stood up, and observed, that the appeal now before their Lordships was brought against several interlocutory orders made by the court of justiciary, the supreme criminal court in Scotland, in the course of a trial for a capital crime, and before final judgement: That the agent had acknowledged to their Lordships, that he was not possessed, nor did he know, of a single instance where an appeal of such a nature had been received, either by the parliament of Scotland before the Union, or by this House since: That in fact a precedent of this kind did not exist: That it would be of the most dangerous consequence to admit of appeals against these interlocutory orders. No body could say how long the trial might thereby be protracted, or when it could be finished, if an appeal lay against every order of the court made during the course of a trial; and which, by management, might be split into a great number of different causes; whereof their Lordships had an instance in the present case, being a second appeal, brought in a few days after their Lordships had declared, that the first one ought not to be received.

He said, the appellant could not have any aid from analogy to the course of proceedings in criminal trials in capital cases here: That, *ex gratia, sed non ex debito justitiæ*, the attorney-general might, if he saw reasonable cause, allow of a writ of error after judgement in capital cases; but that if the prisoner demurred in the course of the trial, by the strict form of legal proceeding, the fact charged is considered admitted, before he can be allowed to proceed in his plea of demurrer; and the demurrer being over-ruled, the court proceeds to judgement as if actually found guilty: but that in other cases, where the demurrer has been over-ruled, and the party afterwards, for the sake of justice, been let into a proof of the facts, a writ of error, after such indulgence, would not be allowed.

He concluded with moving, That the appeal should not be received.

This motion was seconded by the Lord who presented the petition.

He, with his usual accuracy and precision, stated the course of trial before the court of justiciary in the peremptory diets, summoning and attendance of the jury and witnesses, according to lists previously settled and delivered, &c. From all which, he drew this conclusion, That if appeals were to be received against interlocutory orders made in the course of a trial, by artful management it would be easy to prevent the trial from ever being concluded, or at least to spin it out to a great length of time *."

Die Mercurii, 7^o Februarii 1770.

" Upon reading the petition, purporting to be in the nature of an appeal of Mungo Campbell, late officer of excise at Saltcoats, now prisoner in the tolbooth of Edinburgh, complaining of two interlocutory sentences of the court of justiciary in Scotland, of the 22d day of December 1769, and 22d of January last; and praying, that the same may be reversed, varied, or altered, or that the appellant may

* Their Lordships expressed some displeasure at a particular stated in the petition of appeal. What they said upon that subject is omitted, because, had it been mentioned, it would have been necessary to enter on explanations as to a fact that was personal, and of little consequence.

have such relief in the premises, as to this House, in their Lordships great wisdom, shall seem meet; to which petition, Archibald Earl of Eglintoun, and James Montgomery, Esq; for his Majesty's interest, are named as in the nature of respondents; and also upon hearing the agent for the petitioner at the bar; it is ordered, by the Lords Spiritual and Temporal in parliament assembled, That the said petition be rejected."

From what one of the counsel for the prisoner had seen in former cases, he strongly suspected, that the anxiety of the agent for the prosecutors would make him desirous of talking with the clerk of court, as to the jury proper to be summoned in such a case. All the forty-five jurymen, contained in the list served upon the prisoner, were very respectable and worthy men: but they were almost all landed men; for though many of them were designed *Merchants in Edinburgh*, and really were so, yet at the same time most of them had estates. From this circumstance, a suspicion arose, that the jury, in this case, had been suggested to the clerk: for some could not help thinking, that landed men, in such a case, would be liable to a bias and prejudice against the prisoner; and that to summon a jury consisting entirely of landed men, was almost as unequal to the prisoner, in this case, as it would have been unequal to the prosecutor to summon a jury entirely composed of excise-officers or poachers.

This being stated to the other counsel for the prisoner, they thought the conjecture not improbable; and they resolved to challenge the whole jury, if it should appear that there had been any concert or understanding between the clerk and the agent for the prosecutors as to this matter.

In order to come at the fact, they waited upon the clerk, and desired to know from him how it really stood. He gave them a very candid account of it; which satisfied them, that their suspicions were not altogether groundless; and therefore they determined to challenge the whole set of jurymen, or the array.

The challenge and answer were made in the following words:

" Mr

“ Mr Maclaurin for the pannel, represented, That the list of the persons to pass upon the assize had been made up by the clerk of court, who was in use to make up such lists ; but that it would not be disputed, that before making up the said list, the doer for the private prosecutor had suggested to the clerk, that he was desirous a number of landed gentlemen should be upon said list : That the clerk made up the list accordingly, which was laid before, and approved of by the judges ; but that it would not be disputed, that before the judges saw it, at least before it was signed by them, the said list had been shown to, and approved of, by the doer for the private prosecutor, on whose suggestion alterations had been made thereon : That he apprehended, in order to make a trial by a jury safe and fair, it is absolutely necessary that the prosecutor should have no concern in the nomination of the assize, or be allowed to suggest any particular person, or any particular set of men, however respectable, to the clerk, as proper persons to be put upon the list ; because, if that was allowed, an advantage might be taken of pannels, as persons may be put upon the assize, who, from certain circumstances and situations, may have prejudices against the pannel ; and that therefore, when any such thing appeared, he apprehended, a list so made up should be laid aside, and another assize called ; and that in this case, as it would not be disputed, or if disputed, could be easily and instantly proved, that the doer for the private prosecutor had suggested to the clerk, that a number of landed gentlemen should be put upon the jury ; which was accordingly done, though not necessary in this case, as the pannel was not a landed man ; and that the list of the assize had been shown to, and approved by, the doer for the private prosecutor ; he apprehended, that a challenge lay against the array, or the whole assizers summoned.

Whereupon Mr George Muir, principal clerk of court, being called upon by the court, and asked, Whether what was set forth by Mr Maclaurin was the truth ?—he informed the court, that after he had made up a list of assizers in the usual manner, to be laid before the judges for their consideration, he being then confined to the house

by

by indisposition,—Mr John Mackenzie, writer to the signet, agent for the prosecutors, happened to call upon him; and he having shewed him the list for the jury he had made up, which then consisted of more than forty-five persons, Mr Mackenzie observing the names of Sir William Cunningham and Sir Robert Myreton among the jurymen, told him, he thought these improper persons to be in the list of jurymen, on account of their near connection with the Earl of Eglintoun the private prosecutor; Sir William Cunningham being nephew to the Earl of Eglintoun, and Sir Robert Myreton father-in-law to Sir William.—Whereupon he struck out the names of these two gentlemen: That this conversation was merely accidental; and he does not think that he had any other conversation with Mr Mackenzie on the subject, previous to the list being signed by the court: That, in particular, Mr Mackenzie did not desire him to take the jurymen from any class whatever.

Mr Lockhart, for the prosecutor, thereupon moved, That as there was no relevancy in the objection to the list of assize, which is the act of court, not of the clerk, and, in this case, no impropriety on the part of the clerk, that therefore the objection ought to be repelled."

The court over-ruled the objection; but one of the judges (Coaston) said, He thought it should be recommended to the clerk, not to do the like again. No more, however, was said about it.

Here it must be observed, that trial by jury is not upon so proper a footing in Scotland as it might be. Jurors do not come on by rotation; but a certain set is summoned upon every trial. There is no law in this country, as in England, allowing the prisoner a power of challenging a certain number of the jurymen, without assigning any reason; and the judge selects the fifteen, or the *petit* jury, from the forty-five: a power which may often be abused; for although the judge himself should be supposed incapable of pitching upon fifteen that he knew had a prejudice against either side; yet it is plain, when the judge himself is not acquainted with the forty-five, the fifteen must be suggested by some person who is; and that person, it is obvious,

obvious, has it in his power to do mischief. I was concerned, many years ago in a criminal trial, in which the moment the fifteen were marked out, the private prosecutor offered to submit the case to arbiters, foreseeing, from the complexion of the jury, that a verdict would be brought in against him, if he went to trial. This is mentioned to put judges on their guard. There was no design to hurt either side in the judge who chose that jury. It would be much better, therefore, to take the fifteen by lot, or rather that the prisoner had the choice.

Though we have no law allowing the pannel to challenge a certain number of the jurors, without assigning any reason; yet such a challenge ought to be admitted; and I imagine would; for we have no positive law or practice against it, and it is manifestly just to sustain it: as man may have a very good reason for not chusing such a juror should try him, though, perhaps, he would be averse to speak out that reason; or, perhaps, it would not amount to a legal objection; and therefore, without the interposition of a statute, there is good ground for allowing challenges to a certain number of jurymen in this country, as well as in England. It is to be wished, that such challenge were attempted in some trial soon, in order that the opinion of the court may be known upon this point. If the court shall sustain it, there will be no occasion for a statute; but if they shall over-rule it, a statute most certainly ought to pass, putting this matter upon the same footing in this country as it is in England.

The proof came up fully to the charge in the indictment; and some other circumstances were deposed to which did the prisoner no good; particularly, that he made no answer to Lord Eglington, when his Lordship said to him, "Campbell, you have shot me, which I would not have done to you *." His silence on this occasion

* In the indictment his Lordship's expression was alledged to have been, "Campbell, I would not have shot you." Among several anonymous letters, stating observations for the prisoner, which were written to his counsel while drawing the information

caſion was reckoned a mark of fullenneſs; and, it muſt be confeſſed, not without ſome reaſon; though perhaps it was owing to nothing but

“ A tardineſs in nature,

“ Which often leaves the hiſtory unſpoke

“ That it intends to do *.”

One of his counſel remembers, that on aſking him, before he began to plead on the relevancy, Whether he choſe it ſhould be ſet forth, that he felt the deepeſt affliction for what had happened? he answered, with much apparent ſenſibility, “ O certainly.”

The priſoner too failed to prove any verbal injury to him on the part of Lord Eglintoun.

Mr Lockhart charged the jury for the proſecutors, Mr Rae for the priſoner. He mentioned the import of the Engliſh opinions above inſerted: but the court objected to reading them; and juſtly.

The jury in this caſe were not unanimous: twelve were for finding him guilty, and three for bringing in a ſpecial verdict; but one of theſe three, before the queſtion was put, came into the opinion of the majority.

The court met on the afternoon of the 27th February to receive the verdict, and pronounce ſentence. Upon coming into court, one of his counſel went up to the priſoner, and told him, He ſuppoſed he had heard what the verdict was; and that he hoped he would be able to receive the ſentence with conſtancy and reſolution. To which he answered, “ Yes, yes; I never expected it would be otherwiſe.”

formation for him, there was one which endeavoured to take off the force of this expreſſion very ingeniouſly, by ſuppoſing, that Lord Eglintoun, when he pronounced it, laid the emphasis thus: “ Campbell, I would not have ſhot you:” Which would imply, that his Lordſhip underſtood Campbell had fired upon him, from a dread that his Lordſhip would have ſhot him as ſoon as his own gun arrived.

* Lear.

One of the judges, in giving his opinion upon the punishment, said, That as there were some peculiar circumstances in this man's case, he was not for hanging him in chains, or going any further than they were obliged to do by the act of parliament; and accordingly the sentence was, That he should be hanged by the neck till dead, on the 11th of April 1770; and that his body should be given to the professor of anatomy in Edinburgh for public dissection.

On Feb. 28. 1770, the counsel for Campbell were informed in the parliament-house, that he had put an end to his life the preceding night; and that the magistrates of Edinburgh intended to give his body for dissection to the professor of anatomy, and were taking a precognition for proving self-murder against him, in order to justify their disposing of his body in that way. His counsel upon this deliberated what was to be done: they could find no statute, judgement, or law-book, authorising such treatment of a self-murderer's body. The only punishment the books mention for this crime, is escheat of moveables; and to found that, a declarator before the court of session is said to be necessary. They therefore resolved to attempt to rescue the body from the intended disgrace; and one of them was deputed to represent the matter to the magistrates.

He found one of them, and their clerks, in the council-chamber, taking a precognition; which they told him they always did in such cases; and that if self-murder appeared, they had hitherto thought themselves warranted to give the body of the criminal to the professor of anatomy. Upon this he lodged a petition with their clerk for the body, in name of the widow and son of the deceased; and represented, That this procedure seemed to him inhumane and unjust; that no man (dead or alive) ought to be found guilty of a crime, without a fair trial, which this precognition was not; and that the counsel for the prisoner could find no law authorising such procedure. However, he suggested, that the proper method for determining the question would be, to take the opinion of the town's assessors.—Accordingly the case was laid before one of them, who gave an opinion in writing, bearing,

“ I

" I have confidered this petition (for the body) with all the attention I can. The only footing upon which the magistrates can give up the body of Mungo Campbell for diffection, muft be under the authority of the fentence of jufticiary, making that part of his punifhment. But a criminal fentence muft be executed in the precise terms of the fentence, and no otherwife. The words, I obferve, are, " And his body *thereafter* to be delivered to Dr Alexander Monro," &c.; which plainly fupposes, that the firft part of the fentence has been previously executed, by his being hanged upon a gibbet in purfuanee of that fentence.—But what is ftill more material, to give up his body for diffection juft now, would be to execute a part of a fentence before the time fixed by the fentence is arrived; which is clearly illegal; becaufe till then there is always a poffibility, that if the prifoner had lived, the fentence might either have been reverfed upon appeal, (if an appeal is competent), or the punifhment remitted by a pardon. If it had been clear, that Mungo Campbell died a natural death in prifon, during the fix weeks allowed by his fentence, this idea of diffecting, it is probable, would not have been thought of; or, if the fentence had appointed him to be hung in chains, there feems to be little doubt, that the magistrates, after his death in prifon, whether natural, or inflicted by himfelf, could not have authorifed him to be fo hung.

As to fuficide, this is no doubt a heinous offence; and the law of this country has accordingly provided a punifhment for it, viz. efcheat of moveables, upon the fact being eftablifhed in a declarator before the proper court. But I know of no law, nor of any practice, in Scotland, which authorifes any punifhment or feverity to be inflicted upon the dead body of the felf-murderer: nor do I fee upon what authority the magistrates of Edinburgh could take cognifance of this fact, which is a crime in law, and feverely punifhable as above mentioned, or give a judgement thereon in the fummery way that is propofed.—My opinion therefore is, that the magistrates are not legally intitled to appoint the body of this unfortunate man to

dissection, and that it must be delivered up, in terms of the petition."

Another assessor was consulted; and he concurred in opinion, "That the Lord Provost has no power, in virtue of the sentence of the court of justiciary, to deliver up the body to be dissected."

Upon laying these opinions before the Provost, he was satisfied,

"Corpusque exsangue sepulcro
"Reddidit Hectoreum."

He was privately buried somewhere near Arthur's seat. But the spot was unluckily chosen: for the *canaille* of Edinburgh being in use to walk there, discovered his grave next day, dragged out the body, and tossed it about till they were weary. His friends afterwards, to prevent any farther outrage of that kind, sunk him somewhere in the sea. This cruelty in the mob is amazing: for however strong, and however just, their abhorrence of self-murder may be; yet surely they ought to have compassionated the hard fate of that man, whose unhappy end was occasioned by his asserting, against *the great*, the rights of the lower class of people. Those who condemn suicide from philosophical or religious principles, will, no doubt, in extenuation of this his last offence, consider, that he put not a period to his own existence from rashness or impatience, but to avoid the execution of an ignominious, and, as he thought, an unjust, sentence of death. He was none of those

"Qui sibi letum
"Infantes peperere manu, lucemque perosi
"Projecere animas."

To such the great Roman poet assigns but an uncomfortable habitation in the other world; yet he makes Cato, who had a strong reason for his departure, preside in the Elysian fields:

"Secretosque pios, his dantem jura Catonem."

N^o 85.

April 24. 1770.

The THISTLE BANKING-COMPANY in Glasgow, and his Majesty's Advocate,

A G A I N S T

W I L L I A M H E R R I E S.

Forgery.—Madness tried by a jury.

HE was remitted by the session to the justiciary for forging notes of the Thistle Banking-Company in Glasgow.

When the indictment was read to him, and he "interrogate thereupon, he answered in such a manner as to import a denial of the libel."

His counsel represented, "That the pannel's behaviour in court is very singular and extraordinary, and, from his appearance, the state of his mind seems to be that of a person disordered in his judgment; that if the pannel was deprived of his reason, he was in that case not a proper object of punishment."

Being asked, If he made that objection, and insisted upon it, or had any evidence to bring thereof, he declared he knew nothing further about the pannel than what his present behaviour suggested, and that he had no information.

Mr Solicitor answered, That not only from information, but from the pannel's appearance, he was satisfied his seeming disorder of mind was affected; and if the court inclined to have evidence of that, either for their own or the jury's satisfaction, it could be brought.

The Lords "allow the prosecutors and pannel to bring what evidence they can as to the state of mind the prisoner is now in, or has been in since the time of the trial before the Lords of Session, and the decret pronounced by their Lordships; and remit this preliminary question to the knowledge of an assize."

A

A jury was accordingly set, and several witnesses examined. After which the jury was inclosed in an adjoining room. The court continued sitting till they brought in their verdict; which they soon did, finding the insanity not proved.

Upon this the trial proceeded before a new jury, who found him guilty. The court adjudged him to be hanged, and he was executed accordingly.

Att. Solicitor Dundas.

Att. James Boswell.

N^o 86.

July 1771.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

WILLIAM LILBURN and Walter Buchanan.

Indictment for murder restricted to an arbitrary punishment.—Prisoners acquitted, though they confessed the indictment.

They were indicted for the murder of Joseph Martin on the 29th September 1770; and the indictment particularly charged, That they, on the evening of that day, each of them having the spit of a jack in his hand, did attack the said deceased; “and each
“ of you, or one or other of you, did give a stroke or strokes upon
“ the head of the said Joseph Martin, with the spits in your hands;
“ of which stroke or strokes, and the wounds thereby given, the
“ said Joseph Martin died the day following.”

On account of several circumstances, the indictment was restricted to an arbitrary punishment. Upon which the pannels subscribed a judicial confession, bearing, That “they both, or either of them,
“ gave a stroke,” &c.

The jury brought in a verdict, finding precisely in terms of the confession, viz. “That upon Saturday the 29th September last 1770, about ten or eleven o'clock at night, when John
Liddle

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Liddle carrier in Boquhan, Robert Anderson innkeeper at Hole of Glentirran, Andrew Anderson his brother, John Mackieson, the deceased Joseph Martin indweller and horse-hirer in Glasgow, and Robert Robertson serjeant in the 17th regiment of foot, were drinking together in the house of the said Robert Anderson, the pannels were passing homeward by the bridge of Boquhan, near the neighbourhood of Robert Anderson's house: they observed a man at the door thereof, whom they afterwards understood was Serjeant Robertson; when a mastiff or bull dog, coming out of said house, having attacked the pannels as they passed, they threw stones at the dog: That Serjeant Robertson having come upon the bridge, some high words passed between him and the pannels: That the other persons above named, amongst whom was Joseph Martin, having also come from the house to the bridge to *assist* Serjeant Robertson, the pannels, *irritated by the continued attacks of the dog*, and having each of them the spit of a jack in *their* hands, *both, or either* of them, *in the fray*, gave a stroke or strokes upon the head of the said Joseph Martin with the spits in *their* hands; of which stroke or strokes, and the *wounds* thereby given, the said Joseph Martin *died* the day following in the house of the said Robert Anderson: And also find proven, That no assistance was called to the deceased till about ten or twelve hours after he received the wound; and that, if proper assistance had been timeously got, the defunct's life in all probability might have been saved. In witness whereof," &c.

Upon this the counsel for the prisoners objected, That execution could not pass on this verdict; and, after a hearing, the court ordered minutes; which were made up as follows.

" Mr Solicitor moved, That the court would proceed to give judgement in consequence of the verdict.

Answered, That no judgement can pass on this verdict, but that the pannels ought to be *affoizied simpliciter*, and dismissed from the bar: *1mo*, Because of the want of relevancy in the facts found by the verdict; and, *2do*, Because of the uncertainty of the verdict

verdict itself, which contains no explicit finding either against the one pannel or the other: That the facts charged in the indictment amounted to no more than a culpable homicide, even in the opinion of the prosecutor, as appears by the restriction of the conclusions of the libel to an arbitrary punishment: but the facts found by this verdict do not amount to homicide of any kind; so that, at the worst, they could only amount to a riot: but when accurately considered, it will be found, that they are not of such a nature as to amount to a crime of any denomination whatever: That they cannot be considered as homicide; because it is found, That no assistance was called to the deceased till about ten or twelve hours after he received the wound; and that, if proper assistance had been timeously got, the defunct's life, in all probability, might have been saved; so that here the death of the defunct is imputed to the want of assistance, which it was the duty of those about him to call for, and not to the unavoidable consequence of the wound which he had received; consequently, it does not appear to have proceeded from the mere act and deed of the pannels, but from the neglect and culpable omission of those about him to call proper and timely assistance. The charge of homicide being thus taken off, all that remains is to consider how far the crime of battery is found by this verdict to have been committed: and it will appear that it is not; for, in order to constitute a crime, it is necessary to bring evidence, both of a criminal intent, and a criminal act; neither of which appears from this verdict: on the contrary, all that is found to have been done, is found under such circumstances as take away any criminality in the act, and show, that it was done in self-defence. The verdict does indeed find, That there was a fray; and that both, or either of the pannels, in the fray, gave a stroke or strokes upon the head of Joseph Martin with the spits in their hands; but it does not find, that the pannels were the inciters or instigators of that fray, or the first assailants therein; on the contrary, it expressly finds, That they were first attacked by a bull-dog or mastiff; consequently, the stones that they are found to have thrown at the dog, must have been
thrown

thrown in self-defence. In the *next* place, it finds, That Serjeant Robertson came upon the bridge, and that high words passed between him and them: on which occasion, not the pannels, but Serjeant Robertson, must be considered as the aggressor, from the circumstance of his having advanced towards them by coming upon the bridge. In the *third* place, the verdict finds, That no fewer than five persons, among whom was the defunct, came out to assist Serjeant Robertson. In what they were to assist him, is not said; but it cannot be presumed that they only came to assist him in giving high words, as no man can need the assistance of another to do so: the assistance, therefore, must have been to make an attack upon the persons of the pannels; and that such an attack was made, appears from the circumstance immediately thereafter found in the verdict, viz. That there was a fray: and it is also found, That the pannels, or one or other of them, struck, in consequence of their being irritated by repeated attacks of the bull-dog; which, after the master of the bull-dog had come up, must be attributed to the encouragement given by him to the dog to continue his attacks, as it was unquestionably in the power of the master of that dog to have called him off, and prevented his farther attacks: so that the import of the whole is, That the pannels struck, having previous provocation; and struck after a fray had begun; consequently they were acting in self-defence, and on a just foundation. So that, when the circumstances found by the verdict are taken together, and accurately considered, the criminality of the strokes said to have been given by them flies off; and the facts found by the verdict appear to be such as are not relevant to infer any conclusion for punishment on a libel; and of consequence such as, when contained in a verdict, are not sufficient to be the foundation of any judgement awarding punishment. But, *2dly*, Though the facts were such as were in themselves punishable, yet no judgement against the pannels ought to be pronounced on this verdict, on account of the uncertainty of the verdict with respect to the guilt of any of the pannels. It is an unquestionable principle of the criminal law, and particularly of the

criminal law of this country, That no person can be punished, unless the guilt is clear and manifest; infomuch that it has passed into a kind of law-proverb, That it were better ten guilty should escape, than one innocent man should suffer. But if the court should inflict a punishment upon either of the pannels in consequence of the verdict now returned, from the shewing of that verdict an innocent man might suffer, as the verdict itself does not find, that either the one or the other of the pannels committed the facts therein contained; on the contrary, it leaves it altogether uncertain which of them did so, by finding, That *both, or either of them*, gave a stroke; which does not denote with precision which of them did so. And this uncertainty is rendered still more conspicuous by the use of the words *stroke or strokes*, whereby it is rendered uncertain whether more than a single stroke was given: and if nothing more than a single stroke was given, it is plain, that both the pannels could not be guilty; and neither of them is found explicitly to have given the stroke, if there was but one. And though the verdict does indeed use the word *wounds* in the plural number, as if more wounds than one had been given by the stroke or strokes; yet the effect of that is taken off by the subsequent part of the verdict, in which the word *wound* is used in the singular number; so that it is rendered again uncertain whether more than one *wound* was received. The verdict, therefore, is altogether vague, uncertain, and inconclusive, in fixing the facts thereby found upon *either* one or the other of the pannels as his proper act and deed, and is conceived in such terms as not to fix these facts upon both of them. Hence it cannot be made the foundation of a judgement for punishment against either; and therefore both pannels ought to be assolizied *simpliciter*, and dismissed from the bar.

Replied, That he would take the liberty to controvert both the propositions which the pannels counsel had endeavoured to maintain; and to shew, in the *first* place, That the facts found by this special verdict were not so void of relevancy as to free the pannels altogether from punishment; and, *2dly*, That the verdict was not returned in such vague terms as not to be applicable

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to both the pannels. And with respect to the first point, though the conduct of these pannels did appear from the beginning in such a light as moved the public prosecutor to restrict the libel to an arbitrary punishment, yet it is humbly submitted, whether the facts found by the verdict do not amount to culpable homicide? It is true, the jury have found, that if timely assistance had been brought to the deceased, he might have recovered; but it is not from thence to be inferred, that he certainly died for want of assistance; because it is impossible to know with certainty, whether he would not have died, notwithstanding all the assistance that could have been brought him: and therefore, as he was brought into that situation by the strokes which these pannels gave him, it is humbly submitted, whether the facts they are found to have committed do not amount to culpable homicide. But whatever may be your Lordships opinion touching the pannels being guilty of homicide, it can scarcely be denied, that the conduct of the pannels, as ascertained by the verdict, amounted to an illegal fray, or breach of the peace, which must be punishable in some degree; especially when the conduct of the pannels, in that fray or breach of the peace, is aggravated by their having occasioned the loss of a man's life. And, with submission, your Lordships cannot be of opinion, that any of the facts found by this verdict do justify the pannels, or exculpate them from the guilt of battery, or breach of the peace. For, *first*, It is denied, that the facts found by the verdict import any degree, either of self-defence, or exculpating provocation. It is true the verdict finds, that a large dog barked at the pannels: but it does not appear, that he was set on by any person, or that they were in any danger from the dog; nay, the just inference is, that the fray or squabble was brought on, or occasioned, by their throwing stones at the dog. And although it is said, that the stones were thrown in self-defence, yet it is not so found in the verdict; and it appears to be a contradiction in sense, as the throwing of a stone is rather an action of attack than defence. In the *second* place, The verdict does not find, that Serjeant Robertson was the aggressor, or that he gave

the pannels any provocation. And, in the *last* place, Although the verdict does find, that the persons who were in the house came out upon that occasion, yet it is impossible from thence to infer, that they came out to assist Serjeant Robertson in attacking or maltreating the pannels. On the contrary, the verdict finds, That when these other persons came out, the pannels attacked them; and with the spits in their hands, struck the deceased Joseph Martin in such a manner, as that he died next day. So that the obvious and just construction of the facts ascertained by the verdict is, That the pannels met with no provocation; that they themselves were the beginners of the fray; and that their conduct in the fray, by using the spits which they had in their hands, and striking with these, was the means of bereaving the deceased Joseph Martin of his life. It is therefore humbly contended, that both the pannels are found guilty of a criminal act, deserving punishment, although the verdict should appear not to ascertain precisely which of the two gave the stroke that was attended with such fatal consequences to Joseph Martin. There is therefore no occasion for enlarging much on the second proposition, with respect to the manner in which the verdict is expressed. At the same time, it is submitted to your Lordships, whether the terms of the verdict are not such as to comprehend both pannels, even though the facts ascertained should seem to amount to culpable homicide. In so far as is necessary for subjecting the pannels to the punishment of a fray or battery, the verdict is certainly applicable to both, and finds both guilty of facts that fully amount to that crime. It was therefore contended, that in consequence of this verdict, some degree of punishment should be inflicted upon the pannels. What that should be, was humbly left, without suggestion, to the wisdom and justice of the judges."

When the court met to give judgement, July 9. 1771, a petition was preferred for the brother of the deceased, craving an assythment.

Answer. As the prisoners fall to be dismissed in consequence of the verdict, no assythment is due to any person; and though it were, it would

would not be the petitioner, but the widow and children of the deceased, that would be intitled to it.

The court gave judgement as follows. "In respect of the verdict of assize, assilzie the pannels *simpliciter*, and dismiss them from the bar; but reserving to the petitioner, and to the widow, and nearest in kin of the deceased Joseph Martin, their action of damages and assythment, before any competent court, and to the pannels their defences, as accords of the law."

Att. Solicitor, et alii.

Alt. Lockhart, Crosbie, Maclaurin.

N^o 87.

August 1771.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

WALTER JOHNSTONE, and others.

Verdict, finding the pannels guilty art and part of mobbing, sustained.

THE indictment set forth, "That where, by the laws of this, and every other well-governed realms, riot and tumult, to the disturbance of the public peace; and more particularly, the convoking the lieges by beat of drum and ringing of bells, and their assembling themselves together in a riotous and tumultuous manner; and breaking or entering into any houses, granaries, mills, or other buildings, belonging to or in the occupation of any of the lieges, where they kept meal for their provision or sale; and stealing, or predoniously away-taking, from such houses, granaries, mills, or other buildings, meal, sacks, or other things, the property of other persons; or the searching for the same, of purpose to take them away; or the compelling any of the lieges to furnish to them sacks, horses, or carts, for the purpose of carrying off the meal taken by them: Likewise the repeating such riotous, tumultuous, and predonious acts, upon different days or nights: As also the assembling in

a riotous and tumultuous manner in the streets of any royal borough, for the purpose of forcibly preventing any of the lieges from the shipping, or carrying on ship-board, meal from one part of the kingdom to another; and the continuing such unlawful convocations, when desired and intreated to disperse, by the magistrates of such royal borough, where such unlawful convocations are held, and by justices of the peace: As also the continuing of such unlawful convocations, after being required to disperse, and proclamation made for that purpose, directed and authorised by an act passed in the 1st year of the reign of George I. intituled, "An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters:" As also the going in a riotous, tumultuous, and masterful manner, to any port, river, or harbour, for the purpose of taking meal out of any ship or vessel there lying, against the will of the owner; or the going in a forcible manner on board such ship, or vessel, and cutting or destroying the rigging thereof, for the purpose of preventing the carrying or transporting meal on board of such vessel, from one part of the kingdom to another: As also the following, in a riotous and tumultuous manner, the magistrates of a royal borough, justices of the peace, and a party of the military, called and assembled together for the lawful and laudable purpose of preserving the peace, and preventing the mischief threatened to any ship or vessel, on account of its being hired or employed for the carrying or transporting of meal; and the invading and assaulting such magistrates, justices of peace, party of soldiers, and others, when employed in so lawful and laudable a service, with sticks, stones, and other offensive weapons, so as to wound, bruise, and put many of them in danger of their lives; are all crimes of a high nature, and severely punishable: Yet true it is, and of verity, That the persons above named and complained upon, are all, and each of them, or one or other of them, guilty, actors art and part, of all, or some, or one or other, of the said crimes: In so far as, in the night between the 22d and 23d days of February last, in this present year 1771, or in one or other of the nights of days

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days of the said month of February, or of the month of January preceding, or March following, the persons above complained upon, or some of them, or one or other of them, did, with others their associates, assemble in or about the town of Dumfries; and having gone to Bridgend, a village near to the said town, in the stewartry of Kirkcudbright," &c.

Then it proceeded to charge a variety of riotous acts; and it concludes, "At least, at the times and places foresaid, unlawful, riotous, and tumultuous assemblies were held, and the several depredations, masterful invasions, assaults, riots, batteries, and other criminal acts above described, were done and committed; and the whole persons complained upon, and each of them, or one or other of them, were guilty, actors, or art and part therein. All which, or part thereof," &c.

The libel was found relevant to infer an arbitrary punishment; and the pannels were allowed to prove all facts and circumstances, &c.

The jury, Aug. 13. 1771, brought in a verdict, finding the libel not proved as to several of the pannels; but as to the rest, "find it proven there were mobs at the times and places libelled; and find [Here follow the names of some of the pannels] were guilty, art and part, of the crimes libelled."

The counsel for the pannels insisted, That this verdict was good for nothing; and a hearing was appointed.

It was argued for the pannels, "That the verdict returned by the jury was null and void, and could not be the foundation of any sentence against them:

That the libel on which the pannels went to trial, charged a number of riots and illegal acts, which, though of a similar nature, were all of them distinct crimes, differing from each other, not only as to the times and places at which they were committed, but in the degree of guilt which attended them: That these offences were not positively charged upon each of the pannels, but only, as all, or part of them, committed by all, or one or other of them; and therefore it contained a cumulation of different actions against different pannels;

nels; which, by the strict rules of law, could not be admitted; although it was thought so expressed as to obviate the objection arising from that circumstance. The prosecutor, in support of this libel, did not attempt a proof that all the crimes libelled had been committed; and particularly did not attempt to prove an assault upon the magistrates, justices of peace, and military, or that the assailants continued together after the provost made proclamation for their dispersing, in terms of the act 1st Geo. I; and far less, that each of the pannels was guilty of all the crimes which had been committed: on the contrary, this was not attempted as to any one of them; and the utmost tendency of the proof was, to show, that some had been concerned in one, some in another, or some in more than one of them. The nature of this charge and proof, made it necessary for the jury to return a very special verdict, both as to the crimes charged, and the share which the several pannels had in them; and accordingly this was recommended both by the King's Advocate and the Lord Justice-Clerk in their charges. Contrary, however, to what the nature of the case required, and the prosecutor and court had recommended, they had returned a verdict, not finding what particular crimes had been committed, but only that there had been mobs at Dumfries at the times and places libelled; not finding what had been the concern of each of the pannels in these mobs, but in general, that they were guilty, art and part, of the crimes libelled.

The injustice of this verdict was obvious, as it made each pannel guilty, art and part, of all the crimes libelled; though many of them were not proved, and none of the pannels was shown to have been concerned in all such as were: and it made the guilt of all the pannels equal; whereas the proof pointed at, established different crimes, and consequently a different degree of guilt against each of them. And though this did not of itself intitle them to challenge the verdict, yet it gave them reason to expect, that the court would listen the more readily to the legal objections which lay against it. And these were, 1st, That art and part of the crimes libelled was not in this case a legal finding. 2^{dly}, That it appeared from the verdict itself,

itself, that all the crimes libelled had not been committed; and consequently, that the pannels could not be guilty art and part of them. *First*, then, it was contended, That art and part was not in this case a legal finding. Upon this point it was observed, that although such verdicts were sometimes in use to be returned, that the propriety of admitting them in any case might well be disputed. Anciently, when a prosecutor libelled art and part, he was obliged to specify in his libel the facts from which he meant to infer the guilt of the person accused; and before the libel went to proof, the relevancy of these facts was disputed by the pannel, and received the judgement of the court.

In this state of our law, a jury might return a general verdict against one accused as art and part, with equal propriety as they may still against one who is accused as principal committer of a crime; because the relevancy having been already determined, such a verdict implied, that the prosecutor had proved the circumstances found to be relevant. But as the act 1592, cap. 153. has taken away the necessity of libelling the facts inferring art and part, there seems now to be a necessity for the jury's returning a special verdict, ascertaining the facts proved against the pannel, and leaving to the court to determine how far they established guilt. This, in all probability, was the meaning of the act: for unless it is thus interpreted, the jury will be left, not only the power of determining what facts have been proved, but also the relevancy of these facts to infer art and part, although it is the general spirit of our law, that all questions of relevancy should be determined by the court: and there are none more difficult than those which arise upon accusations of art and part. Besides that it would thus take the cognisance of relevancy from the court, and give it to the jury, the admitting a general verdict of art and part would give to the court no proper ground for passing sentence upon the pannel. A person may be art and part, or accessory, to the same crime, in different ways, and with different degrees of guilt; for he may either have advised it beforehand, assisted in the execution, or only aided and abetted the actor after its commission.

A general verdict of art and part leaves it uncertain which of these has been the case; and consequently the judge cannot learn from it what degree of punishment is due to the pannel. Thus in the present case, the verdict leaves the court uncertain whether the pannels acceded before, at, or after the supposed commission of the crimes libelled; and consequently ignorant of the degree of their guilt, and without any certain ground of inflicting the proper punishment: and this uncertainty is a consequence of admitting a general charge in the libel; for before it was in use, the court saw the degree of guilt, from the facts stated in the libel, in the same manner as they now do in the case of a principal. For these reasons, it is apprehended, that a general verdict of art and part could not be the ground of a conviction, unless the facts inferring it had been stated in the libel: but whatever was in that, such a verdict was inept in the present case; because the crimes charged against the pannels admitted not of art and part, or accession.

In atrocious crimes, such as murder, robbery, &c. which are capitally punishable, the law distinguishes between the principal and the accessory; who will in some cases be liable as principal; but in others, being less guilty, only to an arbitrary punishment. But in lesser offences, such as riots, besides that it is more difficult to distinguish the principal from the accessory, the smallness of the punishment due to either makes such a distinction an object beneath the attention of the law. This rule is well known in the English law, and fully explained by the writers upon it. Thus Hales, in his Pleas of the Crown, part 2. chap. 55. vol. 2. p. 613. says, "In cases that are criminal, but not capital, as in trespass, mayhem, or premunire, there are no accessories, for all the accessories before are in the same degree as principals, *Stamf. lib. 1. cap. 48. et libros ibi*; and accessories after, by receiving the offenders, cannot be in law under any penalties as accessories, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do." The same author, vol. 2. p. 616. talking of manslaughter, after observing, That there can be no accessory before,

before, "because it is always sudden and unpremeditated," adds, "Again, the exility of the offence, though it be felony, yet because it is not capital, excludeth accessories before or after; and therefore in petit larceny there can be no accessory." Blackstone, in his Commentaries, book 4. tit. 3. § 1. lays down the same rule; for which he assigns the following reason, "That the law, *Quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors." And Hawkins, in his Pleas of the Crown, part 2. tit. 29. § 2. after laying down the same rule, expressly mentions the crime of riot as one of those in which there can be no accessories. Although the question does not appear to have been tried in this country, the pannels apprehend, that the same rule must take place which has been received in England; because it seems consonant to reason, that the law should not descend to distinctions, when they are in themselves difficult, and there is no motive of sufficient weight for being at the trouble of making them. But supposing there was room for the charge of art and part as to the other crimes libelled, it cannot be applied to the continuing together of the rioters after proclamation to disperse: for that crime being unpremeditated and accidental, there could be no art and part, by advising the commission of it; and those who were present at the time, being equally offenders, could not be distinguished into principals and accessories. And if the finding of art and part in this crime be inept, that circumstance must prove fatal to the whole verdict; for as it finds the pannels guilty art and part of the whole crimes libelled, if they can shew that this finding is absurd as to any one of them, they, in doing so, shew the absurdity of the whole.

But, 2^{dly}, It appears from the verdict, that all the crimes libelled were not committed; and consequently, that the pannels could not be art and part of them.

To make way for the conviction of the pannels as art and part of these crimes, it should appear who were the principal actors of them. By the old law, both of England and Scotland, no other evidence of this could be admitted but the actual conviction of the principals,

upon their having appeared and stood trial. That this was the rule in England, appears from Hawkins, in his Pleas of the Crown, book 2. c. 29. Of the arraignment of principal and accessories, § 45. and Foster's Crown Law, discourse 3. Of accomplices, c. 1. p. 343. and c. 2. p. 365. And that the same took place in Scotland, appears from the *Regiam Majestatem*, b. 4. c. 26. *Quoniam attachiamenta*, c. 83. and Sir George Mackenzie, in his Criminals, part 1. c. 35. Of art and part.

This rule was often inconvenient; because so long as the principal could avoid standing trial, it secured impunity to the accomplice, though equally guilty. For this reason, the rigour of the law has been somewhat relaxed in both countries; and the presumptive guilt of the principal, by outlawry or fugitation, is now held a sufficient ground for proceeding to the trial of the accomplice. But at this day he cannot be tried, unless the principal has been either convicted or outlawed. That this is the rule in England, appears from the authorities already cited. And in the case of James Stuart, who was convicted as art and part of the murder of Glenure, even the counsel for the crown admitted, that it was also the rule in Scotland. That according to this rule, there appeared in this verdict no ground for finding the pannels art and part, as it did not bear, that other persons had been convicted as principals, or fugitated for not appearing to stand trial; one or other of which was, by our law, a necessary proof of the *corpus delicti* for convicting the pannels as art and part. But further, suppose it not necessary for the verdict to shew who were the principal actors, at least it will be admitted, that it must establish a *corpus delicti* by the commission of the crimes libelled; and accordingly it consisted of two parts; one meant to express how far the crimes libelled were proved, and the other what share the pannels had in their commission. The first part is in these words: "They all, in one voice, find it proven, That there were mobs at all the times and places libelled." These words, the pannels apprehended, did not establish the commission of any crime whatever. The word *mob* is not a term known in law for expressing any particular

ular crime. It signifies nothing more, than a meeting or assembly of low people; which may be lawful or unlawful according to the purposes for which it is held. If it was therefore meant by the word *mob* to express, that there had been unlawful or criminal mobs, the jury should have either showed this, by describing what they had done, or by the addition of the words, *riotous*, *tumultuous*, or some such expression. That, supposing them, by *mobs*, to have understood certain unlawful assemblies; yet this would be no proof, that they had been of the kinds libelled. Had the verdict, for example, found, That there were riots and tumults at Dumfries, it would not follow, that the rioters had predoniously carried off meal from certain houses; that they had cut the ropes of a vessel to prevent her from sailing; or that they had made an assault on the magistrates and justices of peace, who came with a military force to suppress them; or continued together after proclamation was made for their dispersing, in terms of the act 19 Geo. II: all of which crimes were expressly libelled. The finding there were riots, supposing the word *mobs* could import so much, plainly implied a denial, that these, or any other crimes, distinct from riots in general, had been committed; and although the after part finds the pannels guilty art and part of the crimes libelled, it must be explained by the first, as the jury could not mean to find them guilty of any other crimes than those which they had found to have been committed. Taking the matter in this light, the verdict was plainly inept, as it found the pannels guilty, not of the riots libelled, or of any particular kind of riots, the guilt of which might be understood by the court, but of mobs in general, without establishing what was their nature, or the degree of their criminality; and consequently, supposing it to prove some kind of guilt in the pannels; yet it did not establish the nature and degree of that guilt, and was too vague and uncertain to be the ground of a sentence for inflicting punishment upon them.

It had been said, The verdict was sufficient without this first part; as the after finding, That the pannels were guilty of the crimes libelled, implied, that these crimes were committed, and that the former

former part of the verdict, which was useless and superfluous, could not hurt this last, which of itself was sufficient to establish the guilt of the pannels. But supposing that this last part of the verdict would be sufficient of itself, the pannels apprehended it would not follow, that the first part was to be disregarded: for although it should be true, that the jury were not obliged to express how far the commission of the crimes was proved, but might have done so by implication; yet, as they had taken this upon them, the court were not left to gather their sense by implication, but must take it from their own words; and as these do not establish, that the crimes libelled were committed, but only, that there were mobs at the times and places libelled, their last finding must be understood to apply, not to the crimes charged in the libel, which they have not found to have been committed, but to the mobs, which they find to have happened at the times and places libelled; and consequently, supposing it true, that if these words had been omitted, the commission of the crimes libelled might have been held as implied, by finding the pannels art and part of them, yet, as they have chosen to express in what degree the commission was proved, there is no room for such an implication, and the verdict remains subject to the exception moved against it.

As for the maxim, *Quod utile per inutile non vitiatur*, which was resorted to by the prosecutor, however just it might be in questions upon wills, covenants, and other deeds, the intention of which was favoured by the law, the pannels did not imagine it could be applied with propriety in this case; because a verdict returned against pannels, being an unfavourable deed, which the law is far from wishing to support, it lays hold of every neglect in form, and inaccuracy in expression, to defeat it; and therefore would not allow any defect in its words to be supplied from the supposed intention of the jury, even had that distinctly appeared; which however was not the case: for as the general finding, that there had been mobs, did not establish the commission of any certain crime to which the pannels could be art and part, supposing it to have done so, the after finding, of art and

Aug. 1771.

The KING against JOHNSTONE, &c.

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and part, did not shew the precise share which they understood the pannels to have had in them. And thus, upon the whole, the guilt of the pannels, and the punishment they deserved, were left uncertain; which, with the other reasons already assigned, it was hoped would satisfy the court, that the verdict was illegal, and could not be the ground of a sentence against the pannels."

The court, though they thought the verdict was not so distinct and accurate as it might and ought to have been, yet they were of opinion, that execution should pass upon it; and therefore they sentenced two of the pannels against whom the verdict had been returned, to be transported, and the rest to be imprisoned, some for a longer, some for a shorter term.

Adv. Advocatus, et alii.

Alt. Maclaurin, Macleod, Cullen.

N. B. The argument for the pannels is stated from the written minutes given in for them; but no answer has as yet been given in for the crown; nor is the record yet filled up to so late a period.

N^o 88.

March 1773.

HIS MAJESTY'S ADVOCATE,

AGAINST

JAMES BAILLIE.

The defences of a person who obtained a transportation-pardon, but did not comply with its conditions, must be tried by a jury.

BAILLIE was, in September 1771, condemned to be hanged for the murder of his wife; but he obtained a pardon from the King, on condition, that he transported himself beyond seas within a limited time, otherwise the pardon was to have no effect.

Having remained in this country after the time prescribed, he was apprehended;

apprehended; and the Advocate applied to the court by petition, praying, That execution should be awarded against him.

Baillie put in answers, setting forth, That he had been prevented, by indisposition, and other unavoidable accidents, from transporting himself within the time limited; and insisted, that his defences should be tried by a jury; and quoted the case of Herries, (N^o 85.), and that of William Baillie in August 1715, (N^o 29.); which last he alledged was in point.

Ans. If the prisoner shall prove, that it really was impracticable for him to transport himself out of the kingdom within the time limited, the prosecutor will not insist to have it found, that he has lost the benefit of his pardon. The only question is, In what manner this fact is to be tried? The prosecutor apprehends a verdict is not necessary; because no crime is to be tried, no new guilt ascertained, but merely, Whether a crime already fixed shall receive its due punishment? which is a question entirely relative to the execution of a sentence of the court; and therefore it is the province of the court to determine upon it. When a woman pleads her belly, the court take proof as to this themselves, without a jury, and determine whether execution shall be stayed, or not; which would not be done, if every incidental fact must be sent to a jury. In the case of Herries, his madness was tried by a jury. This was done in a hurry, and without objection *. But the case does not apply; for the madness there occurred before a verdict was found against him; so that it might be considered as a defence against the indictment. When it is alledged in defence, that a pannel was insane at the time of the crime, that ought to go to the jury, because it is an article of exculpation; but supervenient insanity, when pleaded either in bar of the trial or of sentence, ought not. The case of Baillie in 1715 does not apply: he was indicted, not only for returning from transportation, but for robbery, theft, &c. A jury, therefore, was necessary, in order that the whole charge might be tried at once; as it would have been ab-

* It was done upon the Solicitor's own motion. See p. 533. which is taken from the record.

found to have proceeded, as to part of it by inquisition before the court, as to the rest by trial before a jury.—Case of Anderson and Weir in 1701, (N^o 16.);—Case of Johnston in 1728;—Case of Macdonald of Barisdale in 1754, (N^o 63.). In England a jury would be necessary in this case; because, by statute, returning from transportation is made felony without benefit of clergy: therefore, in such a case as the present, the indictment in England would be laid on the statute for a *new* crime, and consequently a jury would be necessary. But in Scotland there is no trial for a new crime; the only question being, Whether a former sentence shall be put in execution?

The court, March 12. 1773, pronounced the following interlocutor. “Find, That the subject-matter, and conclusions of said petition, with the defence of the prisoner for eliding the same, is proper for a jury-trial; and therefore dismiss the present petition; referring to his Majesty’s Advocate to insist in his charge against the prisoner in the form of a jury-trial, and to the prisoner his defences as accords.”

Att. Solicitor Dundas.

Att. Croftie.

There was no further procedure against this man till the 18th December 1773, when a petition was preferred for the Advocate, praying, “to appoint this petition to be served upon the said James Baillie, that he may prepare for making his defence; and to appoint a day for bringing him into court, that he may be heard in his defence, if he has any defence to make, and that a jury may be appointed for trying the truth of such relevant facts as may be offered in his defence; and in case of no relevant defence being pleaded for the prisoner, or in case of any such relevant defence as may be pleaded, not being found proven by the verdict of a jury, to order the sentence to be executed against the said James Baillie, at such time, and in such manner, as to the court shall seem proper; and in case any relevant defence against execution of the sentence being found proven by the verdict of an assize, to grant a reasonable time

for the said James Baillie's yet transporting himself, agreeable to the intendment of his Majesty's pardon."

The court, 18th December 1773, ordered this petition to be served on Baillie, and him to be brought to the bar on the 14th January next, "in order to make his defence, if he any has, against the "prayer of the said petition."

He put in answers, which resumed the petition, and stated a variety of facts, tending to excuse his not transporting himself within the time limited by the pardon; and he sets forth,

"These facts are all of them most strictly true: but as the most material part of them happened at Whitehaven, where the diligence of this court cannot compel the attendance of witnesses on your Lordships; and as the witnesses with whose knowledge the facts are consistent, have refused to come here, unless the respondent will pay them a sum for their expences, which he is utterly unable to pay; he finds himself not in a situation to bring satisfactory evidence of these facts to your Lordships or a jury.

And as, without establishing the facts which happened at Whitehaven, the other facts above condescended on (particularized) would not avail him, as they happened long after the period of forty days allowed him for his transportation were expired, he is laid under the necessity of throwing himself on the mercy of the court, which he hopes will not award execution against him, merely because he cannot compel the attendance of witnesses that reside in another kingdom; or if the court feel themselves under the necessity of appointing his former sentence to be put in execution, that they will allow him a sufficient time to lay his case again before his Majesty, and to procure such evidence of the facts above mentioned as may once more procure him his Majesty's pardon; which he humbly hopes, on his case being explained, will not be refused."

Before either of these papers was given in, it had been concerted between the crown-lawyers and the counsel for the prisoner, that he should wave any proof, be condemned, and then get another pardon. This, it is informed, was agreed to by the crown-lawyers, because

because of the interlocutor, finding a jury-trial necessary in this case, which rendered the matter inextricable, as they did not know what to indict him for, or how to proceed against him, had he stood on his defence. The court; on advising the petition and answer, pronounced the following interlocutor.

“ 27th January 1774. The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered the petition of James Montgomery of Stanhope, his Majesty’s Advocate, for his Majesty’s interest, recorded the 18th December last, against James Baillie, sometime residenter at Greenend, in the parish of Liberton, and county of Edinburgh, present prisoner in the tolbooth of Edinburgh, with the sentence of death formerly awarded by this court against the said James Baillie, and also his Majesty’s most gracious pardon to the said James Baillie, expedite under the seal appointed by the treaty of Union to be kept in Scotland in place of the great seal formerly used there, bearing date the 7th day of March 1772; whereby his Majesty is graciously pleased to remit, indemnify, and pardon, the said James Baillie of the crime of murder therein mentioned; but under this express condition always, That the said James Baillie should, within the space of forty days after he should be liberated in virtue of the said remission, transport himself forth of his Majesty’s dominions of Great Britain and Ireland, never to return thereto, without liberty to that effect first had and obtained from his Majesty, his heirs, or successors, under his or their Royal sign-manual, privy or great seal; and if after the said time the said James Baillie should be found within his Majesty’s dominions of Great Britain and Ireland, in that event the said remission is declared to be void as if the same had never been granted, and the said sentence pronounced upon the said James Baillie shall continue in force, and be put to execution: and having also considered the answers given in for the said James Baillie now at the bar, read over in his presence, and subscribed by him in presence of the court; wherein he admits, That he was found and apprehended at Falkirk within the

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“ kingdom

“ kingdom of Great Britain, upon the 12th day of September 1772,
“ after the expiry of the time assigned in his Majesty’s pardon for
“ his transporting himself forth of his Majesty’s dominions of Great
“ Britain and Ireland, and that he is not in a condition to bring a-
“ ny evidence of the facts set forth in his answers for avoiding the
“ effect of the condition annexed to his Majesty’s pardon; the said
“ Lord Justice-Clerk, and Lords Commissioners of Justiciary, find,
“ That the said James Baillie has not complied with the condition
“ of the said pardon; and find and declare the said pardon and re-
“ mission void as if it had never been granted, and that the former
“ sentence of death awarded against the said James Baillie stands in
“ force, and ought to be carried into execution; and in respect
“ thereof, the said Lords, in terms of the said former sentence, de-
“ cern and adjudge the said James Baillie” to be hanged on the 30th
March then next.

He soon after this sentence got another pardon. Few cases have occurred in which there has been such an expenditure of mercy.

Jan. 1773.

The KING against MURDISON, &c.

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N^o 89.

HIS MAJESTY'S ADVOCATE,

January 1773.

A G A I N S T

ALEXANDER MURDISON tenant in Ormiston, and John Miller his shepherd.

Charge of stealing sheep, or receiving sheep knowing them to be stolen, relevant.—Verdict good though signed on Sunday ;—though it did not exhaust the charge, having found only some articles of it proved, and said nothing as to the rest ;—though it did not find proved either of the crimes alternatively charged, but only certain articles of the libel.—No appeal competent from the court of justiciary.—Report of his Majesty's Advocate in 1764, as to the competency of such appeals, and the grounds upon which the appeal was dismissed in this case.

THE indictment * sets forth, " That where, by the laws of this and all well-governed realms, *theft*, and particularly *sheep-stealing*, or the *receiving* and *keeping* sheep, or *exposing* them to sale, knowing them to be *stolen*, are crimes of a heinous nature, and *severely punishable* ; yet true it is, that you, and each of you, or one or other of you, have presumed to commit, and have been guilty, actors, or art and part, of the aforesaid crimes ; in so far as William Gibson tenant in the farm of Newby, in the county of Peebles, having, some time after Whitsunday last, occasion to shade out his hogs, or young sheep, from his other sheep, in order to separate his wedder-hogs intended for sale, from his ewe-hogs, intended to be kept, he and his herds missed six or seven wedder-hogs, known to them by head-mark, or their natural marks or appearances, they imagining that said hogs might have strayed or gone into some neighbouring flock, searched for them, but could not find them ; and, some time thereafter, the said William Gibson having occasion to shade out from his wedder-hogs some ram or tup hogs, with which

* There are many phrases in this indictment intelligible to Scotch shepherds only. I am ignorant of the correspondent expressions in English ; but it is by no means necessary to know the meaning of these terms in order to understand the questions in law arising upon this indictment.

he

he intended to compete for the premium given by the trustees for the improvement of manufactures to the county of Peebles, for encouraging the improvement of the breed of sheep there, he and his herds missed one of the said tup-hogs, which was known to them by head-mark; and they likewise searched for the said tup-hog in the neighbouring flocks, but could not find it: And the said William Gibson having, upon the 9th day of July last, or about that time, gathered his flock of ewes and lambs upon his farm of Newby, for the purpose of speaning the lambs, by separating them from the ewes, he, his herds, and others who assisted him, observed a ewe which they knew to be his; but his marks upon her were altered in the manner following: The marks used by the said William Gibson upon his sheep are a birn on the nose like to the letter T, thus T; the near lug or ear cut round, and a tar on the near rig of the oldest ewes, a tar on the near rib of the middle-aged ewes, and a tar on the near-side of the youngest ewes; the ewe, observed as above, retained William Gibson's mark on the near lug, but was tapped in the far-lug, and fore-bit to the stump of that lug, which appeared to be new done, and she had a new birn like to the letter O, thus O, superinduced upon the old birn T, and the old tar-mark on the near-rib was taken away, having the appearance of being plucked off, and there was a new tar-mark upon the near-rib not then dry. And Thomas Gibson tenant in Grieston, a farm in the county of Peebles, and his herds, having, in the month of June, or beginning of July last, missed out of the flocks on said farm three ewes known to them by head-mark, they searched for them in the neighbouring farms, but could not find them; and Robert Ritchie, one of the herds on the said farm of Grieston, being assistant in the speaning of William Gibson's lambs in the farm of Newby, when the ewe above mentioned was particularised and observed; and the birn O upon the nose of the said ewe being known to some of the company to be the birn or mark which you Alexander Murdison used upon your sheep, a suspicion arose, that the said ewe had been stolen, and after having her marks altered as above, had returned to her own flock; and that the

the other sheep which had been missed by the said William and Thomas Gibsons might probably be found in the farm of Ormiston *alias* Wormeston, in the county of Peebles, possessed by you Alexander Murdison; and it was agreed upon to apply to the sheriff for warrant to search, which was accordingly obtained; and it being known, that some sheep, lately before that time, had been sold off the said farm of Ormiston *alias* Wormeston, to Robert Noble tenant in Winkston, in the county of Peebles, it was agreed, that the persons employed in executing the warrant should divide, and that the flocks on Ormiston *alias* Wormeston, and on Winkston, should be examined at the same time. And the flocks of you Alexander Murdison, on your said farm of Ormiston *alias* Wormeston, having been examined upon the 10th day of July last, or upon one or other of the days of that month, or month of August following, there were found in them eleven ewes, known to be the property of the said William Gibson tenant in Newby, and one ewe, known to be the property of James Hyslop, one of his herds; the marks on nine of which ewes were altered, and new marks put on, in the same manner as had been done to the ewe above taken notice of; which first gave cause to suspect you the said Alexander Murdison of having stolen the sheep amissing: but the new marks put upon the other three ewes were somewhat different; they were back-halved in the far-lug, and a tar-mark was put upon their far-haunch: and the said twelve ewes being separated from the rest, and having bleated, or cried, four or six lambs broke off from the flock of eild sheep, which was near at hand, and run to the ewes, and minnied or mothered themselves by sucking; and which lambs were marked with the marks made use of by you the said Alexander Murdison. And upon examining the eild hirsell of you the said Alexander Murdison, there was discovered in it the tup-hog which had been missed from the farm of Newby, and which was known to the herds of Newby by head-mark; and the marks of which tup-hog were likewise altered, and the marks of you Alexander Murdison endeavoured to be substituted in their place: And there were found at the same time, in the flocks of you Alexander

ander Murdison, twenty-one ewes, some of which were known by head-mark, and all of them from the marks which had been put upon them, to be the property of said Thomas Gibson tenant in Grieston: for althotgh the same practice had been followed in defacing, as much as possible, the marks of the said Thomas Gibson, and substituting in their place the marks of you the said Alexander Murdison, excepting one ewe, upon which the marks used by you John Miller were endeavoured to be substituted; yet so much remained of the old marks as to make it known that the sheep were the property of the said Thomas Gibson: And several lambs out of the eild hirsell or flock of you the said Alexander Murdison did mother or minnie themselves among those twenty-one ewes, in the same manner as had happened with regard to the ewes of William Gibson: And upon examining the flocks of the aforesaid Robert Noble in Winkston, there were found three ewes with lambs, known to be the property of the said William Gibson tenant in Newby; and one ewe with a lamb, known to be the property of the said Thomas Gibson tenant in Grieston; and the old marks upon these four ewes were defaced as much as possible, and new marks were put upon them, viz. they were back-halved upon the far-lug, and tarred upon the far-haunch, and a new birn, like to the letter I, thus I, was put upon the nose of three of the ewes which belonged to William Gibson, and the new marks put upon them were the marks commonly used by you John Miller: And the said Robert Noble declared, and the fact is, that he had bought two small parcels of sheep from you the said John Miller, and that these four ewes were part of these two parcels, and the new or recent marks put upon them were the marks commonly made use of by you John Miller; and which fifteen ewes and one tup-hog, the property of the said William Gibson, and one ewe, the property of the said James Hyslop, and twenty-two ewes, the property of the said Thomas Gibson, had recently been upon the said farms of Newby and Grieston; or at least were upon the said farms at smearing-time, in the months of October or November last, and were stolen therefrom: As also, Robert

bert Horsburgh tenant in Colquhare, in the county of Peebles, having, in the month of June last, when shading his hogs, to fit them for carrying to market, missed many of them; and some time thereafter having heard, that sheep understood to be stolen had been found upon the aforefaid farm of Ormiston *alias* Wormelston, possessed by you Alexander Murdison, upon a search being made there, he likewise applied for a warrant to search, but found none of his hogs there: And the said Robert Horsburgh having heard, that you, the said Alexander Murdison, had sold three score of hogs at one of the markets held at the village of Linton, in the county of Peebles, in June last, to John Bertram tenant in Westhope, in the county of Haddington, and suspecting that his hogs might make part of that parcel: and the foresaid William Gibson tenant in Newbie, having likewise heard of the said sale, and suspecting that the hogs amissing from his farm, and which he had not found in the flocks of you Alexander Murdison, might make part of the parcel which was sold to the said John Bertram, did, in conjunction with the said Robert Horsburgh, resolve to examine the flocks of the said John Bertram, to know whether any of their hogs made part of the parcel sold by you Alexander Murdison to the said John Bertram; and the said Robert Horsburgh, with some of his own herds, and some of the herds of the said William Gibson, having gone to John Bertram's farm of Westhope, they, by his permission, examined his flocks, and found in them fifteen hogs, the property of the said Robert Horsburgh, and thirteen hogs, the property of the said William Gibson; and some of which hogs were known by head-mark, and all of them by the marks of the respective owners: for that, although the hogs were clipped, and thereby the tar-marks removed, and that the birns, and lug or ear marks used by the said Robert Horsburgh and William Gibson were endeavoured to be defaced, by substituting the birn and lug-mark commonly used by you Alexander Murdison in their place; yet the old marks nevertheless remained visible; and the persons who examined and inspected the sheep pointed out to the said John Bertram, his servants and others who were with him, the

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difference

difference between the new and the old marks, with which they were satisfied; and the said John Bertram declared, and the fact is, that the said twenty-eight hogs were part of a parcel of three score which he had bought from you Alexander Murdison at Linton, in the month of June last; and which fifteen hogs, the property of the said Robert Horsburgh, and thirteen hogs, the property of the said William Gibson, had recently been upon their respective farms of Colquhane and Newby; or at least were upon the said farms at shearing-time, in the month of October or November preceding, and were stolen therefrom: As also George Kello tenant in Hameldean, in the county of Peebles, having, in spring and summer last, missed several of his ewes upon his farm, did, upon the 16th day of July last, apply for and obtain a warrant for examining the flocks of you Alexander Murdison: and having done so accordingly, in presence, and by the assistance, of persons acquainted with his sheep and marks, they found there twenty-three ewes, the property of the said George Kello; two ewes the property of James Scott, late herd to the said George Kello, now tenant in Harrandean in the county of Edinburgh; and one ewe, the property of Peter Saunderson, servant to Robert Aitken in Callands, in the county of Peebles; part of which ewes were known by head-mark, and all of them by the marks of the owners, notwithstanding means having been used to deface those marks, and to substitute in their place the mark made use of by you the said Alexander Murdison: And more particularly, the said twenty-three ewes, the property of George Kello, were distinguishable by the newness of the said Alexander Murdison's birn upon them, and other appearances, from forty-two hogs bought by you Alexander Murdison, from the said George Kello, two years preceding, and which, or so many thereof as were alive, had become ewes: And the said persons, immediately after examining the flocks on the said farm of Ormiston alias Wormeston, having gone to Winkston, and examined the flock of the aforesaid Robert Noble tenant there, they found one ewe, the property of the said George Kello, which ewe had not the birn commonly used by you Alexander Murdison

dison superinduced upon George Kello's own birn, as George Kello's other ewes had which were found in your flocks, and there was a new ear-mark put upon her ear-haunch; and the said Robert Noble informed them, and the fact is, that the said ewe was one of the last parcel of sheep he had bought from you John Miller; and which twenty-four ewes, the property of the said George Kello, and two ewes, the property of the said James Scott, and one ewe, the property of the said Peter Saunderson, had recently been upon the said farm of Hameldean; or at least were there at shearing-time, in the month of October or November preceding, and were stolen therefrom: As also several sheep belonging to Alexander Gray tenant in Lyne, in the county of Peebles, being missed in the said farm of Lyne; and several sheep being amissing in the farms of Curhope and Cloich, in the county of Peebles, possessed jointly by John Tweedie tenant in Stanhope, and James Tweedie tenant in Dreva, both in the county of Peebles, the said Alexander Gray, John and James Tweedies, having likewise been informed, that some of their sheep were seen in the said farm of Ormiston *alias* Wormeston, possessed by Alexander Murdison, they applied to the sheriff, and obtained a warrant for examining the flocks of you the said Alexander Murdison, upon your farm of Ormiston *alias* Wormeston; and in consequence thereof, did, with the assistance of others to whom their sheep were known, upon the 21st day of July last, or one or other of the days of the said month, or month of August following, examine the flocks of you the said Alexander Murdison upon your farm of Ormiston *alias* Wormeston, and found in them five ewes, two gemmers, two ewe-hogs, and one wedder-hog, all the property of the said Alexander Gray; twenty-two ewes, the joint property of the said John and James Tweedies; one ewe, the property of John Johnston; one ewe, the property of William Tennant; and one ewe, the property of George Tait, all herds to the said John and James Tweedies, in the farms of Curhope and Cloich; part of which sheep so found were known by head-mark, and more generally they were known by the marks of their respective owners; which marks, on

some of the sheep, were not defaced by superinducing new marks; and in others of the sheep, the marks of the owners were in part defaced, and particularly the birn, by the superinducing a new birn like to the letter O, which is the birn used by you the said Alexander Murdison: And the flocks of the before-mentioned Robert Noble, on his farm of Winkston, being examined upon the 25th of July last, or upon one of the days of that month, or of the month of August following, they found in them five ewes, the joint property of the said John and James Tweedies, whose lug or ear marks were attempted to be defaced by new marks, but upon whom the birn like to the letter O, nor no other birn, had been put; and the said five ewes, two gemmers, and three hogs, the property of the said Alexander Gray, had recently been upon his farm of Lyne; and the said twenty-seven ewes, the joint property of the said John and James Tweedies; one ewe, the property of the said John Johnston; one ewe, the property of the said William Tennant; and one ewe, the property of the said George Tait, had recently been upon the said farms of Curhope and Cloich; at least, the said sheep were upon the said farms of Lyne, Curhope, and Cloich, at smearing-time, in the month of October and November preceding, and were stolen therefrom: As also Walter Simpson tenant in Easter Dawick, in the county of Peebles, having been informed, about the beginning of July last, that several of his sheep were seen in the flocks of you Alexander Murdison, upon your farm of Ormiston *alias* Wormeston, by those who had been searching them for stolen sheep, he did count or number the sheep which he had pasturing upon the common of Winkston, which he has in lease from the borough of Peebles, and discovered about twenty of them to be amissing; and having, with the assistance of those to whom his sheep were known, and by authority from the sheriff, examined the flocks of you the said Alexander Murdison, upon your farm of Ormiston *alias* Wormeston, in the month of July last, he found there sixteen of his ewes, and four of his hogs; some of which were known by head-mark; and all of them by his marks, which were discernible, although means had been
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been used to deface them, by superinducing other marks in their place: As also George Cranstowne of Dewar, Esq; having, in the month of June or July last, missed several ewes and lambs out of his flock upon the lands of Dewar, in the county of Edinburgh, in his occupation; and David Tweedie tenant in Ladyfide, in the county of Edinburgh, having likewise missed ewes and lambs about the same time off the said farm of Ladyfide, possessed by him, they came to be informed, that sheep, bearing their marks, were seen upon the farm of Snadown in the county of Haddington, possessed by James Saunderson; upon which they sent their herds to examine the flocks upon the said farm of Snadown; and they having found ten ewes and lambs, the property of the said George Cranstowne, and eleven ewes and lambs, the property of the said David Tweedie, the said George Cranstowne and David Tweedie presented a petition to the sheriff of Haddington, upon the 2d day of September last, praying to be allowed to prove their property in the said sheep; and they having accordingly brought evidence of the sheep being their property, they were, by order of the sheriff, delivered to them; and upon inquiry, they discovered, and the fact is, that the said ewes and lambs came upon the farm of Snadown, and into the possession of James Braidwood, herd in the said farm, in the following manner, viz. The said James Braidwood having gone to a fair held at Heriot-house in the county of Edinburgh, in the month of May last, he met with you John Miller at the said fair; and having inquired, if you could furnish him with a score of ewes and lambs, you answered, that you knew two herds who had a score to sell, and you could buy them for him; and having settled the price at L. 9 Sterling the score, payable the night before Dalkeith fair, held in the month of October last, you undertook to deliver them at the said farm of Snadown in a fortnight; and you having suggested your not being acquainted with the road to the said farm of Snadown, the said James Braidwood desired you to call upon his brother Andrew Braidwood, herd in the farm of Fleckswells, in the county of Edinburgh, which was in your way, who would shew you the road to
Snadown;

Snadown; and accordingly you the said John Miller did, about two or three of the clock in the morning of the 14th day of June last, or of one or other of the days of the said month of June, call at the house of the said Andrew Braidwood, and told him, that you had brought the ewes and lambs which you had promised to his brother James Braidwood, and desired that he would carry them forward to his brother at Snadown, as you was obliged to return home; and you having delivered the said sheep, consisting of twenty-one ewes, and twenty-one lambs, to the said Andrew Braidwood, he did carry or drive them forward to Snadown, and delivered them to his brother the said James Braidwood; and they were the ewes and lambs the property of the aforesaid George Cranstone and David Tweedie, which were found upon the farm of Snadown in manner above described; and which ten ewes and lambs, the property of the aforesaid George Cranstone, and eleven ewes and lambs, the property of the said David Tweedie, had recently been upon the said lands of Dewar and farm of Ladyside; or at least the said ewes were upon the said lands of Dewar and farm of Ladyside at smearing-time, in the month of October or November preceding, and were stolen therefrom: At least, times and places respectively above mentioned, the aforesaid quantities of sheep, belonging to the persons before named, or part thereof, were stolen; and you the saids Alexander Murdison and John Miller, and each of you, or one or other of you, *are guilty, actors, or art and part, of the said thefts, OR of receiving, and having in your custody, the aforesaid parcels of sheep, or part thereof, and of selling part of them, knowing them to be stolen.* All which," &c.

The prisoners pleaded, Not guilty. Then a debate on the relevancy followed. Two objections were stated for the prisoners: 1st, That the alternative in the major proposition was faulty, receipt of theft not being libelled, nor what was equivalent; 2^{dly}, That all the facts charged in the minor proposition might have happened, without either of the pannels committing any offence.

The court over-ruled the objections. One of the judges, however,

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ver, said, it would have been better to have libelled in technical terms.

On Friday the 8th January, the proof began at eight of the clock in the morning, and lasted till late in the evening of Saturday the 9th. The evidence was summed up by the Lord Advocate on the part of the crown, and for Murdison by Mr Crosby; for Miller by Mr Rae. The jury were then inclosed, and continued sitting till five of the clock in the morning of Sunday the 10th, when they made out their verdict; which bears date at Edinburgh, the 10th January 1773.

On the 11th the court met and received the verdict, which is in the following words. "By a great plurality of voices, find the following articles of the indictment proven against the said pannel Alexander Murdison, viz. in so far as regards eight ewes of the eleven ewes, and the tup-hog, the property of William Gibson tenant in Newbie, in the county of Peebles, and one ewe, the property of James Hyflop herd to the said William Gibson, which were found on the farm of Ormiston *alias* Wormeston; as also in regard to twenty ewes, part of twenty-one ewes, the property of Thomas Gibson tenant in Grieston, in the county foresaid, found on the pannel's farm afore said: And all in one voice find the following articles of the indictment proven against the said Alexander Murdison, viz. in so far as regards the fifteen hogs the property of Robert Horsburgh tenant in Colquhare, in the county foresaid; and thirteen hogs, the property of the above-mentioned William Gibson, sold by the said Alexander Murdison to John Bertram tenant in Westhope, in the county of Haddington, and found on the said farm of Westhope; and also in so far as regards the sixteen ewes and four hogs, the property of Walter Simpson tenant in Easter Dawick, in the county of Peebles, and found on the farm of the said pannel: And all in one voice find the indictment proven against John Miller, the other pannel, in so far as regards the ten ewes and lambs, the property of George Cranston of Dewar, and eleven ewes and lambs, the property of David Tweedie tenant in Ladyside in the county of Edinburgh."

On a motion by the counsel for the prisoners, who desired to be heard on the import of this verdict, the court adjourned till the 15th, and afterwards till the 25th; when there was a very long argument on the exceptions taken to the verdict: 1st, That it was signed on a Sunday; 2^{dly}, That it did not exhaust the indictment; 3^{dly}, That it was uncertain.—— Informations were ordered.

It was argued in the information for the crown, (by Mr Cosmo Gordon), That when the indictment, interlocutor on the relevancy, and verdict, are considered together, the last would not only appear to be proper, but uncommonly accurate. The indictment charges the prisoners with being severally guilty of crimes; and states a variety of articulate facts, from which these crimes are inferred. The verdict finds the indictment proved in several articles against one of the prisoners, and in one article against the other. There is no ground, therefore, in law or common sense for denying the verdict to be clear and distinct.

Had each of the articles in this indictment been made a separate indictment, and each indictment contained the same major proposition, and the same charge of art and part, with that in question, and had the jury found each of these indictments proved, no objection could have lain against the verdicts. Now separate facts being charged in this indictment, it is the same as if so many separate indictments had been exhibited; and this verdict, finding the indictment proved, is the same with a verdict, finding in general an indictment proved which contained but one article. In this view of the matter, and it is a just one, the verdict cannot be set aside, without overturning the interlocutor on the relevancy.

The practice and forms of the law of England in criminal matters are not to be regarded here, when inconsistent with justice and reason; and that they are often so, Hales witnesseth in his Pleas of the Crown, vol. 2. p. 193.

As to the objection, That the verdict is signed on Sunday, the highest authority allows necessary works to be gone about on Sunday, Matth. xii. 1. & 11.; and so does the Roman law, l. 3. 10. C.

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De feriis. This trial was begun on Friday morning; and the prosecutor had good reason to believe it would have been finished before Sunday. Many verdicts have been signed on Sunday, upon which judgement has followed; and no arrest of judgement was ever moved for upon that account before.

As to the objection, That the verdict is imperfect, as it only finds some of the articles proved, the English cases quoted by the prisoners from Viner, *voce* Trial, do not seem consistent with one another; neither do they apply: for in these cases the facts referred to the jury composed but one issue; but in this indictment the separate articles make separate issues; and the verdict, finding so many articles proved, exhausted so many issues: and in Scotland the issue is not composed of all the facts set forth in the charge; for it always bears, "All which, or part thereof, being proven," which restricts the issue to any part of the facts on which the prosecutor shall bring proof. The objection has no countenance from the practice of this country; and a number of instances are annexed, of judgements proceeding upon verdicts which were silent as to some of the articles of the indictment. The pannels will never be again tried for the articles upon which this indictment is silent. Were they to be tried for them, this verdict would afford them a good defence; for, from the favour of innocence, the silence of the verdict would be held an acquittal so far.

As to the objection, That the verdict is uncertain,—If it be reckoned a special verdict, it is a clear case; the jury have found the facts without going further; it is the province of the court to judge, whether these facts infer theft, or receipt of theft.

If the verdict be reckoned a general one, there is still no uncertainty as to the facts, but only as to the law, which it is the business of the court to settle. The plain import of the verdict in this view is, "We find such and such facts proven, with respect to such and such parcels of sheep; we further find from these facts, That the prisoner Murdison is guilty of stealing or receipting, knowing them to be stolen, some parcels of these sheep; and that the prisoner Mil-

ler is guilty of stealing or receipting another parcel; but we cannot determine whether, by the rules of law and legal evidence, the facts which we have found ought to infer theft, or receipt of theft."

When a jury finds special matter, but draws an erroneous conclusion in law, the court may hold the verdict for ascertaining the facts, and give them their proper effect, without regarding the opinion of the jury in law, Hale, v. 11. p. 302. Here the jury have drawn no erroneous conclusion. It is not competent for the prisoners to plead now, that the receiving sheep, knowing them to be stolen, does not infer guilt; for this plea was over-ruled by the interlocutor on the relevancy. The facts charged and found do amount to receipt; and the style of all the indictments for this crime at the Old Bailey, and every where else, is, "receiving goods, well knowing them to be stolen."

The prosecutor can see no foundation for maintaining, as the prisoners do, that if the court has power to ascertain the crime of which they have been found guilty, it is under the necessity of finding it to be receipt; because that is less severely punishable than theft. The passage quoted from Hale is clear against this notion.

Though it were solid, it would not avail the prisoners; because receipt is a capital crime. Mackenzie asserts, that a receipteer with us is punishable as the principal thief; and the statute 21^o Alex. II. which he quotes, expressly says so. Mr Erskine holds the same doctrine; and so stands the Roman law, Voet. *lib.* 47. *tit.* 4.

The distinction mentioned by Mackenzie, betwixt mediate and immediate receipters is not very intelligible; but, at any rate, if facts are found proved sufficient to infer the crime of receipt; and if the pannel say, that he is a mediate, not an immediate receipteer, this is a circumstance of exculpation, which cannot be admitted unless proved.

The information for the prisoner Murdison, (by Mr Blair), which applied also to Miller, divides the argument into two branches, considering the verdict first as a general, next as a special one.

Obj. 1. If this verdict be supposed a general one, then it is *uncertain*, and execution cannot pass upon it. The criminal charge is alternative:

ternative: You are guilty either of stealing sheep, or of receiving them, knowing them to be stolen. It does not accuse the prisoners of both crimes. It would have been absurd to do so; for a man cannot receipt goods which he himself hath stolen. If the verdict be supposed general, then it has found the indictment proved: but the indictment is uncertain; and it is properly so; for it was the business of the jury to ascertain which of the crimes alternatively libelled the prisoners had committed. But if the verdict be general, it is as uncertain as the libel. It imports not a conviction of both crimes. If it did, it would be void; for the two offences are in the libel charged disjunctive. It is the same case as if the crimes had been charged in separate indictments, and the jury had found one of them proved. In a civil case, if upon a brief of mortancestry a man should claim to be served heir of line, or heir-male, or at least heir of provision, and the jury should serve *affirmative*, in terms of the claim, would not that service be null? *Sententiam certam esse oportet.* Trial par pais, vol. 1. p. 285.

The uncertainty of this verdict lies not, as the prosecutor supposes, in finding a *special matter*, without saying what crime that amounts to, but in finding the *criminal charge* proved, which charge is uncertain.

Obj. 2. Supposing the court could apply this verdict to one branch of the charge, it must fix upon that branch which implies the least guilt.

The prosecutor is mistaken in saying, this would not avail the prisoners, receipt being capital; for that is not law. It is true, that in some of our ancient law-books, the receipt is said to be punishable as the thief: but it is much doubted, whether theft itself at that time was capital; and though aggravated theft has been made so by statutes or practice, it by no means follows, that receipt has risen in proportion, or that it is punishable more severely than simple unaggravated theft. In England it was only a misdemeanor till 5^o Ann. c. 31. and 4^o Geo. I. c. 12.

But if the verdict is applied to the second branch of the charge,

no crime can be inferred. For, 1st, The charge does not amount to receipt. One may receive goods, knowing them to be stolen, for the purpose of detecting the thief. The clerk of court often receives goods, knowing them to be stolen, for the purpose of keeping them as evidence against the thief, when tried. One may sell such goods for behoof of the owner, who is absent. The crime don't consist in receiving goods, knowing them to be stolen, but in doing so with a fraudulent intention; and nothing is found against the prisoners as to that. The prosecutor is surely mistaken, when he says, such charge or verdict would be sustained in England: for the word *felonice* is essential; Hawkins ii. 23.; Blackstone iv. 23.

2^{dly}, The libel charges receiving such and such parcels, or *part* thereof, knowing them to be stolen. What the precise number was so received or sold, the charge and verdict leave uncertain. By a *part*, two, or even one, may be meant; but it was never held, that the receipt, or even the theft, of one sheep or two, was capital. The contrary is laid down by Mackenzie, tit. Theft, § 7. See too case of Andrew Cochran, 10th July 1671. He was tried for using false weights and measures. The jury, by a plurality, found it proved, "That his weights and measures were light and short, but the quantity they wanted not proved." The court "affoizied; because the verdict was *unclear*, and disconform to the dittay."

3^{dly}, Receipt is either immediate from the thief himself, or mediate, by the interposition of others; and this last is clearly not capital, Mack. tit. Theftbote, § 7.; act 1587, c. 110. In this case, neither the charge or verdict ascertain of which species of receipt the prisoners were guilty. If a man were indicted, and found guilty, of adultery, would he be punished for notour adultery? This shews the impropriety of the prosecutor's argument, that if receipt be libelled, and the prisoner was only a mediate receiver, he must prove that in exculpation.

Obj. 4. If the verdict be applied to the second branch of the indictment, the whole procedure is inept; as no person can be punished for receipt till the thief, the principal, has been convicted; stat.

Dav. II.

Dav. II. c. 29.; from which practice has only varied so far, that an act of fugitation against the thief is sufficient for founding a prosecution against the receiver; Mackenzie, tit. Theftbote; Royston's notes.

Obj. 5. The verdict does not exhaust the indictment. The charge mentions several parcels; the verdict only three. No answer, That the prosecutor passed from the rest. The jury bound to do equal justice to both parties; and to find what is not proved, as well as what is proved, *Reg. Maj.*; Balf. Pract. Of Brieves, c. 35. The cases quoted for the prosecutor on this point may have passed *per incuriam*; nor was the indictment alternative in any of them.

If this verdict be reckoned a special one, the general charge in the close of the indictment, of being guilty, actors, art and part, must be laid out of the question; and the case is the same as if certain articles of the minor proposition had been found proved, and repeated verbatim in the verdict. But these articles, separately or cumulatively taken, do not amount to any crime; and people of the best character may have, and often have had, stolen sheep on their farms; they have often sold stolen sheep. In order therefore to fix a crime upon persons who have received stolen sheep, or sold them, it is necessary to prove, that they *knew* of the previous theft. In order to found condemnation upon this verdict, the court must not merely apply the law to the facts as they stand in the indictment, to which the verdict refers, but go a step further, and consider these facts as a kind of circumstantial evidence, from which another fact is to be inferred, not alledged in the indictment, viz. that the prisoners were concerned in carrying off the sheep, or in *fraudulently* receiving them, knowing them to be stolen; but this mode of judging is beyond the powers of the court, and would have the effect, if adopted, to make a jury of the court. The only proper occasion of judging upon a special verdict, is when the whole facts necessary for the application of the law are *expressly* found by the verdict, and the question arises upon the facts as therein stated. In such cases, the court can judge without determining upon the import of circumstantial evidence,

evidence, or without inferring or presuming any fact, as the groundwork of their judgement, which is not expressly found by the verdict; but the court is confined to the facts expressly found, and cannot imply others: so that if the issue is not expressly found, the verdict is bad; Hawkins's Pleas of the Crown, b. 2. c. 47. § 9.; Kieling, p. 109. Rex v. Plummer.

If the court could take up the circumstances in the verdict, and judge upon them as *evidence* of something more than what is therein contained, they might as well go directly to the proof, and reconsider the depositions.

Though the court could consider the facts in the verdict as matters of evidence, yet the prisoner should be acquitted; because these facts do not necessarily infer guilt. This plea is not excluded by the interlocutor on the relevancy; for when that was pronounced, it was uncertain what facts might come out on proof; and till that was over, it could not be known whether the prisoner's receiving or selling stolen sheep, knowing them to be stolen, would infer guilt: the whole circumstances were therefore sent to the jury; and had they found facts which excluded the possibility of innocence, the court might condemn; but no such facts have been found. Suppose a farmer or gentleman has a great number of sheep under the charge of a herd, and that he having made free with some of his master's sheep, in order to make up the number, purloined from his neighbours, the stolen sheep must of necessity have his master's mark put upon them, the master may very innocently dispose of them, or allow them to remain on his grounds: when tried for theft, it may well happen, that he cannot prove how he came by them; consequently the jury may, with a safe conscience, find the same facts proved against him that they have against the prisoners: yet it is an equal chance all the while that he is innocent *.

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* This appears to have some weight: but the court paid no regard to it; nor was it thought solid by the counsel for the prisoners; because, were it listened to, it would seldom or never be possible to convict sheep-stealers. To one of the counsel, however,

The last objection to the verdict arises from its date, which proves it was signed on Sunday; for upon that day no judicial proceedings can be legal; *l. 11. c. De feriis*; Canons lately published, *c. 29.*; Skene in his Treatise of Crimes, *tit. 8. § 3.*; Lord Bankton's Inst. *b. 4. tit. 42. par. 3.* Nor can necessity be alledged by the prosecutor; for there was nothing to hinder him to have brought on the trial the beginning of the week: and had he done so, it might have been brought to a period without incroaching on Sunday. There may have been some instances of a jury fitting and signing their verdicts on Sunday; but a few such instances, which have been allowed to pass unchallenged, cannot convert a practice apparently so improper into an established law *.

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ver, it appeared plausible; and he therefore stated it at the hearing, with several illustrations.—The difficulty of detecting sheep-stealers may be a good reason for passing a statute, ordaining that crime to be *presumed* from circumstances which do not necessarily infer it, as has been done with regard to child-murder; but is it proper for a court of justice to introduce, by decisions, a *presumptive* crime? The maxims, That it is better ten guilty persons should escape, than one innocent be condemned; and, That no man is to be presumed guilty where there is a possibility of innocence, are no longer universally true, if the prisoners are to be condemned upon the facts found by this verdict.—The killing a man is an act hurtful and atrocious in itself, therefore *prima facie* criminal; and there may be reason for condemning him against whom it is proved, unless he makes out a defence: but the receiving stolen sheep is not an act hurtful and atrocious in itself; on the contrary, it is often done for lawful and laudable purposes; therefore it ought not to be considered as *prima facie* criminal, and made the ground of condemnation unless the prisoners prove that they came honestly by the sheep: that it may be often impossible for an innocent person to do. However, the court of justiciary, not only in this case, but in several others, has gone upon quite different principles as to sheep-stealing.

* There certainly was nothing in this objection.—Our laws and customs, with respect to the observation of the sabbath, have fluctuated not a little, and at present seem not very consistent.

Fairs and markets were anciently held on Sunday. This practice is indeed discharged by 1503, *c. 83.*; but it crept in again not long after: And by 1540, *c. 122.* Sunday, Monday, and Thursday, are declared to be market-days in the town of Edinburgh. The weekly market of the borough of Forfar was likewise held on Sunday; but by 1593, *c. 195.* Friday is substituted in the place of it. Several later statutes have

O P I N I O N S *.

AUCHINLECK. As to the first objection, with respect to Sunday, the interests of religion and virtue depend much on a proper observation of the sabbath; at same time, the law of God excepted cases of necessity and mercy. The work the jury were employed in was

have again and again forbid fairs or markets to be held on Sunday, and they have been obeyed.

By our old law, summonses could not be executed on Sunday. Statute Law abridged, *voce* Sunday; but by act of sederunt, 23d November 1613, instead of letters of four forms, letters of horning being introduced upon decreets of the court of session, the charge is appointed to be given, either personally, or at the party's dwelling and parish-kirk conjunctly, upon a Sunday forenoon, in time of preaching or prayer; whereof a copy shall be left upon the most patent door. By 1644, c. 14. letters of caption cannot be executed on days appointed for solemn fasts and thanksgivings, during the time of divine service; but warnings, inhibitions, requisitions, and other letters, may be read on Sunday; (See Statute Law abridged, *voce* Execution; but compare the Dict. of Decis. *voce* Sunday). Poindings, and other executorials, cannot be gone about on holydays, by 1469, c. 34.; yet even at this day, messengers execute warnings, and make intimation of sales, on Sunday, at church-doors; and there, and then, auctions, strayed cattle, and things lost, are proclaimed. So that we have not carried the matter so far as the Roman law in *l. 11. C. De feriis*.

As we suffer notification to be made on Sunday, of sales, warnings, auctions, &c. which most certainly are not works either of necessity or mercy, one would think, that a farmer might, without giving offence, sow the ground, or lead home his crop, on a Sunday, that happened to be a good day for such work: but, in all probability, he would be exclaimed against as a sabbath-breaker. Nay, such work, however necessary, seems to fall under the act 1579, c. 70.; which ordains, "that na handie-labouring, nor working, be used on the sabbath-day," without making any exception. Here, too, the Roman law differs from ours: "Omnes judices, urbanaeque plebes, et cunctarum artium officia, venerabili die Solis quiescant. Ruri tamen positi agrorum culturae libere licenterque inserviant: quoniam frequenter evenit, ut non aptius alio die frumenta fulcis, aut vineae scrobibus mandentur, ne occasio ne momenti pereat commoditas coelesti provisione concessa." *l. 3. tit. 12. lib. 3. C. De feriis*.

* This note is inaccurate; but it will give some idea of the grounds the judges went upon, which were very different.

a work of necessity, and to the country of mercy.—At circuits, I have seen a trial last two days and two nights, though all pains were taken to shorten it. In the case of a soldier tried at Air some years ago for a murder, the jury was inclosed at three o'clock on Sunday morning.—As to the second objection, That the libel is not exhausted, the silence of the jury as to some articles, for want of evidence, or otherwise, will not vitiate the finding as to the rest.—As to the third and capital objection:—The libel charges a variety of facts; then comes the general conclusion from them all, That the pannels had been guilty of either theft or receipt.—This I do not consider as properly part of the charge. The facts are specially mentioned, and the conclusion is expressed alternatively; because the advocate does not know how the proof will turn out. The crime from the proof may be either theft or receipt. It has been said, the verdict is uncertain; but it is certain, that it finds five different acts of theft proved against Murdison, and two against the other pannel. If the argument for the pannel were good, it would alter our forms entirely; and instead of taking jurors from among country-people, or merchants, there would be a necessity for taking them from among the members of the college of justice. Such must be the consequence, if it were incumbent on the jury to say, whether the fact to be proved, be receipt, or theft. Proper province of the jury is the fact. In some cases they may tell law; but if they cannot, God forbid they should not tell facts, and we judge of the law. Upon the whole, for over-ruling the objections.

KAMES. I am for repelling the objection as to Sunday, pretty much on the ground already stated. The objection is founded on a mistaken notion of duty to God, and would carry us as far as the superstitious notions of the Jews did them.—They would not defend their city against Pompey on their Sunday. Had it not been for this superstition, Appian says, Pompey could not have taken it.—We know the subtleties of the English law, both in civil and in criminal matters. I thank God we have got free of many fetters which they still are under, and which Lord Hale accordingly regrets. Suppose the

jury had said, in the words of the indictment, "A has stole so many sheep:" they do the same thing; they refer to it. I could not fit down in my closet, and devise any thing clearer. It is the same as to the other pannel. I can make no distinction betwixt the master and the servant, though the latter may have been led into it by the influence of the former. This may have effect somewhere else. As to the distinction between receipt and theft, I dare to say the jury never thought of it. They have found facts proved, and we are to judge. If these facts are not enough, Lord have mercy on this country; for theft would go with impunity.

PITFOUR. As to Sunday, the objection would be strong if the trial had begun on that day, as it would be very wrong to employ that day directly in secular business; but when, without intention, it comes in upon time which the managers of the trial thought sufficient, there is no ground for an objection.—Won't say a word as to the libel's not being exhausted; for there is nothing in the objection.—The only difficulty is uncertainty; and had there been a real uncertainty, the *levior pœna* must have taken place: but I can see nothing more clear, than that the jury found every one of these articles proved so far, and conjunctly proved; and therefore I think the verdict, which is our rule, has found, that one pannel has stole a certain number of sheep, and the other a lesser. I see nothing in the argument, whether it was theft or receipt. I see nothing in the proof, that could lead to one more than the other. It does not appear to me in the least probable, that the jury intended to create any doubt, or throw in a clause that would hurt the whole. Would wish to give way to the milder punishment; but can see no ground to justify it.

COALSTON. Clear for repelling the objection as to Sunday, for the reasons given. In the vacation-time, the justiciary-court may begin to trial on a Monday, but the circuit-courts must often begin on Saturday.—As to the second objection, That the verdict is imperfect: The only security pannels have against a new trial, is their being cleared by the jury. By the law of England, this defence would have

have been sufficient to set aside the whole verdict; but there is a material difference between the law of England and that of Scotland. In our neighbouring country, judges may re-inclose the jury, if the verdict is insufficient. I know not whether this court ever had such power: in practice we have it not now.—Jurors cannot be precise in legal words; therefore if a verdict be substantially right, I would give it force. I pay no regard to the objection; at same time must observe, the pannels are intitled to a full verdict.—The last is the capital objection. I am persuaded the jury meant to find special facts charged in the indictment proved; and taking it in that light, I agree in thinking enough is found to infer theft, unless the jury had reported to us proved how the pannels came by the sheep. Enough proved to infer theft.—Counsel for the pannels argue, That we cannot infer from facts; but, with submission, we can. I am blind to the proof, but may judge of facts from the verdict. Counsel for the pannels maintain, That notwithstanding these facts, the pannels may be innocent. Were this solid, there would be no possibility of convicting criminals. Therefore if the jury had found specific facts, I should have been for the capital punishment; but it appears to me, that the jury have not found the specific facts charged in the indictment, but the indictment itself. Now what is the indictment? It is alternative, and so is the verdict. They have found either one or other. This is what occasions my difficulty. At same time, I believe the jury intended only to find specific facts proved; but as they have gone further, though without intending it, and have found alternatively, it is competent for the pannels to avail themselves thereof; and therefore I am for the highest arbitrary punishment.

KENNET. As to Sunday, had the trial begun upon it, the objection would have been good. As to the second, it is not necessary the jury should answer to all the articles. Their silence would afford a good defence against a new trial; besides long practice against the objection. As to the last and capital objection, good deal in it had the verdict been a general one: but I do not take it in that light. It is a special verdict, finding particular facts. It is the same as if

the jury had so far transcribed the indictment word for word: in this view, certainly it is in the power of the court to judge of the import of these facts. As to the difficulty of my learned brother, I may be in a mistake, but it does not strike me. It is the practice for the prosecutor to charge particular facts. He knows not what will come out. He charges one or other. I cannot think the jury meant, by a few lines, to take away what they had found. Had they done so, we must have judged accordingly; but I will not suppose they have done so.

JUSTICE-CLERK. My idea, the verdict finds certain articles proved. From the meaning, words, and legal language, cannot apply to the conclusion drawn from facts, which is an act of the understanding.—Think they cannot be understood to extend to the subsumption of the libel, “At least,” &c.; for with no propriety can this fall under the articles proved. I think we cannot adject this subsumption to the verdict without the greatest violence. The jury have not said one word as to guilt, but left it on facts, all as specially described, by referring to the articles of the libel, as if ingrossed in the body of it. It would be to me a very extraordinary thing, if we should apply this subsumption to the verdict. It would be adjecting a wrong finding to it, which the jury have given no authority to do.—I conceive many cases in which it would be highly dangerous, if the court should adject to a special finding the subsumption of “at least” in the libel.—With regard to Miller, it is very true, the jury have varied their expression; but I cannot think, that, in the same verdict, they would find different things. It comes then to a case well known in this and other countries, that when special facts are found, the court must judge of the import of them. Had the verdict been, Guilty, then there would have been no facts, and your Lordships would have been brought into the necessity my brother stated as his difficulty: then the question would have been, Theft or Receipt? and all your Lordships agree, that in that case the lesser crime would have been presumed. Had a general verdict found all the articles, as also the guilt, proved, then it would have been in the power of the court to judge as to which crime, from the indictment; which

as here, would be part of that verdict.—Tho' disagreeable to me to enter upon the law of England, yet cannot help taking notice, that Judge Hale says, If the jury set forth in their verdict a special matter, which amounts to murder, the court is not bound by a false conclusion drawn by the jury.—If there had been in this case a general verdict, finding guilty, the court must have determined what guilt, and taken the lesser crime; but as in this case the jury return a *special general verdict*, we must judge of the import. The jury have found, [read the articles]. Now let me ask my own mind, and every intelligent person, anxious for the preservation of the country, if stronger proof need be of theft? Jury have not only found these facts, but not one article of exculpation to take these off. One parcel of sheep might have strayed, but could all the parcels centre on his grounds? Was he intitled to deface marks, though he did not advertise? In these extensive farms, can it be expected any person should see him drive off the sheep? When facts are so returned to me, I am under the same oath with the jury, and must say, in this case, that I believe in my conscience the pannels are guilty.

The court adjudged the pannels to be hanged.

Against this sentence the prisoners offered a petition of appeal; which was remitted, March 10. 1773, to a committee; and upon their report the following judgement was pronounced. “ Upon report from the Lords committees appointed to consider, whether the petition and appeal of Alexander Murdison tenant in the town of Ormiston *alias* Wormeston, in the county of Peebles, and John Miller, shepherd to the said Alexander Murdison in the said farm of Ormiston *alias* Wormeston, both now prisoners in the tolbooth of Edinburgh, ought to be received; it is ordered by the Lords Spiritual and Temporal in parliament assembled, that the said petition and appeal is not properly brought, and that the same be, and is hereby rejected.”

Thus was the great question, as to the competency of appeals from the court of justiciary, at last determined in the negative. In order
to

to explain the grounds of this judgement, some pains have been taken to collect such materials as seemed most proper for that purpose.

The learned author of the Historical Law-tracts, first printed in 1758, expresses himself upon this subject as follows, vol. i. p. 420. 421. 422. " The House of Lords is undoubtedly a court of appeal
" with respect to the *three* sovereign courts in this country. There
" are appeals daily from the court of session. Appeals from the
" court of justiciary have hitherto been rare, and probably will never become frequent. The proceedings of this court being brought
" under precise rules, afford little matter for an appeal; which, at
" the same time, would be but a partial remedy, as the verdict of
" the jury can never be called in question. An appeal, however,
" from this court is competent, as well as from the session; of which
" there is one noted instance. The King's Advocate, and the procurator for the kirk, prosecuted the magistrates of Elgin before
" the justiciary for an atrocious riot, specifying, That being intrusted by the ministers of Elgin with the keys of the Little Kirk of
" Elgin, instead of restoring them, when required, they had delivered them to Mr Blair an Episcopal minister, by which the established ministers were turned out of possession. In this case, the
" following circumstance came to be material to the issue, Whether
" the said Little Kirk was, or was not, a part of the parish-church?
" The affirmative being found by the court of session, to which the point of right was remitted, as preliminary to the criminal trial,
" the magistrates entered an appeal from the court of session; and,
" upon that pretext, craved from the court of justiciary a stay of
" further proceedings till the appeal should be discussed. The prosecutors opposed this demand, founded on an order of the House
" of Lords, 19th April 1709, resolving, " That an appeal neither
" stays process, nor sits execution, unless the appeal be received by
" the House, an order made for the respondent to answer, and the
" order duly served on the respondent;" and urged, That this not
" being done in the present case, the court ought to proceed. This
" court accordingly proceeded in the trial; and pronounced sentence,

" tence, 2d March 1713, ordaining the pannels to deliver up the
" keys of the Little Kirk, with L. 20 of fine, and L. 30 of expences.
" The defendants, who, in a criminal prosecution, are with us call-
" ed *pannels*, appealed also from this sentence of the court of justici-
" ciary: and the sentence was reversed."

The procedure on Mr Macintosh's appeal, and that attempted by Campbell, has been already stated.

Lieutenant Ogilvie, after he was condemned, made an application to the privy council for a respite, until he should have an opportunity of presenting a petition of appeal, the parliament not being fitting when sentence was pronounced against him; and a respite was accordingly granted, which was afterwards renewed.

Mr Ogilvie about this time obtained an opinion from an English counsel, Mr Maccarty, which was published in the news-papers and magazines, (not very properly, the question being in dependence); and is as follows as to this point.

" The 19th article of the Union confirms the jurisdiction of the
" court of session; and in the same terms it confirms the jurisdiction
" of the court of justiciary. It mentions nothing of an appeal from
" the court of session to the House of Lords:—yet those appeals are
" frequent. It mentions nothing for or against appeals from the
" court of justiciary: it certainly does not exclude them.—There
" lies an appeal from the court of exchequer in Scotland to the
" House of Lords. To admit of an appeal from the two supreme
" courts in Scotland, where property only is concerned, and not to
" admit of an appeal from the third supreme court, where life, ho-
" nour, property, and posterity, is concerned, appears somewhat
" extraordinary.

" By the same article of the Union, it is enacted, That no causes in
" Scotland be cognoscible, or any judgement from thence be recog-
" nosced, reviewed, or altered, by the courts of Chancery, Queen's-
" bench, or Common Pleas, or any other court in Westminster-
" hall. This negative clause as to Westminster-hall, and the courts
" there, seems to imply a power of recognoscings and altering causes
" and

“ and judgements in the House of Lords. I think it is the common
“ rule of construction.

“ I believe there are few instances of appeals from the court of ju-
“ sticiary : but that is not a proof that such appeal cannot lie. I
“ remember a petition of appeal was sent from Scotland in the affair
“ of Barisdale. There was some difficulty made about presenting
“ the appeal. Lord Bath was applied to : but he said, it was a
“ branch of business he never meddled in, nor was he disposed to
“ meddle for the future in any public affair, unless it was such as
“ was of the highest importance to the nation ; however, he would
“ go to the House, and mention it to the Chancellor : and in some
“ days after, being called upon, he said he mentioned the affair to
“ the Chancellor ; but that it was unnecessary to struggle as to the
“ petition, as the King, out of his gracious disposition, would give
“ the same relief that was aimed at by the petition.

“ If there is no way open from the court of justiciary to the House
“ of Lords, it is the only court in Great Britain which is not sub-
“ ject to that jurisdiction ; for writs of error go from the King’s-
“ bench to the House of Lords, even in cases of high treason. It is
“ not a common practice, I confess ; but yet it has been done. —
“ I see neither reason nor law why the proceedings of the court of
“ justiciary might not fall under the review of the supreme court,
“ as well as those of the court of session.”

While this case was under his Majesty’s consideration, the Attor-
ney-General of England was ordered to give his opinion upon this
point ; which he did, and it imported, “ That according to his
“ knowledge of the Scotch law, no appeal from the court of justi-
“ ciary lay, by the law of Scotland, to the parliament of Scotland,
“ upon the merits of a capital offence, before the Union ; and
“ that since the Union it had never been thought of, any more than
“ it had been allowed in England.”

The Lord Advocate of Scotland was also directed to give his opi-
nion upon the point ; and his Lordship, after examining the records
and law-books, and hearing counsel on the part of Lieutenant O-
gilvie,

gilvie, in support of his right of appealing from the sentence of death pronounced against him, made a very elaborate report to the secretary of state, putting a negative upon such appeals.

This report is nearly as follows, I having only varied the expression a little in some passages, without ever altering the sense.

In one of our oldest statutes, Alex. II. c. 2. § 6. it is enacted, "That all men convicted of theft or slaughter before the justiciary, shall be delivered to the barons, or their bailies, to do justice upon them in their free baronies, without any ransom or remedy, except the King's grace and remission happen to be given." This statute is quoted as the law by Sir James Balfour, President of the court of Session in the reign of Queen Mary, tit. *Justice Eyre*, c. 37. p. 573.; and by Sir John Skene, Lord Register in the reign of James VI. in his treatise, *Of crimes and judges in criminal causes*, tit. 14. parl. 7. subjoined to his Collection of the old books of our law. Sir George Mackenzie, Advocate to King Charles II. and our latest writer upon the criminal law, though he treats expressly of the jurisdiction of parliament in crimes, and of the jurisdiction of the court of justiciary, does not give the smallest hint of an appeal being competent from the justiciary to parliament. Lord Stair, in his noted argument upon the authority and jurisdiction of the Lords of Session, b. 4. tit. 1. § 61. holds it as indisputable, that the sentences of the court of justiciary are final, without remedy by application to the King or parliament. In short, there is not in any one book of authority in our law *, the least hint or insinuation, that any appeal lay from the court of justiciary to the parliament of Scotland.

After a diligent search into the records of the parliament of Scotland, as far back as they are extant, which is from the reign of James I. of Scotland, no instance of an appeal is to be found brought before the parliament, against the sentences or judgements of the court

* No notice is here taken of the passage in the Historical Law-tracts above transcribed; probably because the opinion there given is rested entirely upon the judgement in the case of Elgin.

of justiciary. A like search has been made into the records of that court from the 1672, when it was new-modelled into its present form; and no trace of any such appeal has been discovered.

This is stronger than the opinion of a hundred lawyers; because it ascertains the fact, that no such appeal was ever taken; and in this case the fact ascertains the law. The instances of capital, and other sentences, for all sorts of crimes, pronounced by the court of justiciary, are innumerable, and many of them against persons of rank and fortune; yet no such method of suspending or avoiding these sentences ever was attempted; which shows it has been the universal opinion of the nation, and of all lawyers throughout succeeding ages, that no such remedy was competent in law.

There are indeed, in the records of parliament, instances in almost every reign, of dooms of forfeiture for high treason, passed in the court of justiciary, being reversed in parliament. But this appears to be no argument, that an appeal to parliament was competent against the sentences of the court for murder, incest, or other crimes, to stop the execution of these sentences. If such appeals had been competent, many instances must necessarily have occurred of the subjects resorting to that remedy for preserving their lives.

The vicissitudes of government gave frequent occasion to the reversal of dooms of forfeiture for high treason. These dooms were often passed in parliament as acts of attainder are in England, and were as often reversed in after parliaments by the same form, and in the same words, as the reversals of the dooms of forfeiture passed in the court of justiciary.

It appears from the records of the justiciary, that the privy council did often interpose in the proceedings of the court of justiciary, by mitigating fines and arbitrary punishments, by reprieving the execution of the sentences of that court, by ordaining no sentence to pass upon verdicts, and many other arbitrary acts; but every body knows the tyranny and usurpation of that court, more odious in the memory of Scotchmen than the star-chamber is in England. Sir George Mackenzie, who was long Advocate to Charles II. and as
such

such a member of his privy council, condemns many of their usurpations, and lays it down as clear law in his Institutions, b. 1. tit. 3. That they could not remit capital punishments. To the great happiness of the subjects of Scotland, this tyrannical court was abolished by 6^o Ann. c. 6. which enacts, " That there shall be but one privy council for the kingdom of Great Britain; and that such privy council shall have the same power as the privy council of England had at the time of the Union, and none other."

When the Revolution gave the people of Scotland an opportunity of vindicating their rights and privileges, and obtaining redress of grievances, the estates of parliament, in their claim of right 1689, do assert, " That it is the right and privilege of the subjects, to protest for redress at law to the King and parliament, against sentences pronounced by the Lords of Session, provided the same do not stop execution of these sentences." This was thought necessary for the security of the property of the subjects; and was explained by the after practice to import a right of appeal from that court to the high court of parliament: but no such claim is made as to sentences pronounced in the high court of justiciary. The safety of the public depended upon the speedy trial and execution of criminals. The criminal law, and the forms of trial, were more fixed and certain; and, above all, the security which the subjects had by a jury-trial before the court of justiciary, and their last resort in all cases to the grace and mercy of the sovereign, were sufficient reasons for the estates of parliament to leave the jurisdiction of that court to remain upon the same footing as it had stood from the earliest period of our constitution.

When the Union of the two kingdoms took place, it was agreed and enacted by the 19th article of that treaty, " That the court of session shall, after the Union, remain in all time coming as it was then constituted by the laws of that kingdom; and that the court of justiciary do also after the Union, and notwithstanding thereof, remain within Scotland, as it is now constituted by the laws of that kingdom, and with the same authority and privileges as be-

“fore the Union; subject nevertheless to such regulations as shall be made by the parliament of Great Britain.”

At the time of the Union, the right of appeal from the court of session to the parliament of Scotland, as ascertained by the claim of right, of necessity devolved that appellate jurisdiction upon the House of Peers, as the only parliamentary jurisdiction known in the constitution of England; and such jurisdiction has been accordingly uniformly exercised by that high court, upon appeals from the court of session, ever since the Union. But as no appeal was competent from the court of justiciary to the parliament of Scotland, so the above article of the Union appears to exclude the right of appeal from the sentences or judgements of that court to the House of Lords; and the order of that House, regulating the time of presenting appeals from the courts in Scotland, must be understood to mean such courts from which appeals could legally be brought into that House: and this opinion is strongly supported by the acquiescence of the people of Scotland, from the Union down to this time; for, upon the most diligent search, no instance can be found of an appeal taken to the House of Peers against any sentence of death, or other criminal sentence, pronounced in the court of justiciary.

The only case which seems to have given rise to any doubt on this matter, is that of the magistrates of Elgin in the 1712. The magistrates being then of the Episcopal persuasion, had allowed the use of a waste part of the old cathedral church of Elgin, called the *Little Kirk*, adjoining to that part of the cathedral which was made use of for the parish-church, to Mr David Blair, an Episcopal minister, duly qualified under the act of toleration of Queen Anne, and had supported him in the possession thereof; upon which a criminal indictment was brought at the instance of Mr John Dundas, procurator of the church of Scotland, with concurrence of the Queen's Advocate, against the magistrates of Elgin and Mr Blair, before the court of justiciary, concluding, That they ought to be decerned to restore the possession to the Presbyterian minister of the parish, and also to make

make payment of L. 200 Sterling, in name of damages and expenses.

It is evident this question turned altogether upon this, Whether that waste part of the cathedral was part of the parish-church? or if it belonged to the borough, and was at the disposal of the magistrates? which was certainly a question of civil right: and nothing but the heat of religious and party zeal could have brought that question to trial by way of criminal indictment before the justiciary. And accordingly, when the relevancy came under the consideration of that court, they "stopped further procedure, and remitted to the Lords of Session to try and determine the above prejudicial question in point of right." The Lords of Session accordingly did so; and found, That the place in question was part of the parish-church.

Against this judgement the magistrates appealed to the House of Peers; and during the pendency of that appeal, the prosecutors insisted in their criminal action before the court of justiciary. The magistrates pleaded the pendency of their appeal upon the prejudicial question of civil right; but the court of justiciary thought fit to proceed; and a verdict was returned, finding it proved, "That the established minister had the possession of the Little Kirk in question, and that the magistrates, and Mr Blair, the Episcopal minister, took possession thereof." And upon this verdict the Lords of justiciary decreed the defendants to put the established minister in possession of the said Little Kirk, and to pay Mr John Dundas, procurator for the church, L. 30 of costs; and fined the defendants in L. 20 Sterling for her Majesty's use.

The defendants appealed against this sentence to the House of Peers, where the prejudicial question of civil right was depending upon the appeal from the court of session; and both appeals having been heard in the House of Peers upon the 3d of July 1713, their Lordships ordered and adjudged, "That the aforesaid sentences of the court of session and court of justiciary, appealed from, be reversed; and ordered and adjudged, that the appellants be quieted in the possession of the Little Church in Elgin, being no part of
" the

“ the parish-church ; and that the respondents do repay them the
“ costs and fine adjudged by the sentence of the Lords of Justi-
“ ciary *.”

This case is not a precedent for appeals *in such questions as the present* ; for the original appeal to the House of Peers was from the court of session, upon a point of civil right : and though the court of justiciary, pending that appeal, proceeded in the criminal action, and decreed damages and a fine against the appellants, on the footing of the interlocutor of the court of session appealed from ; yet when the House of Peers reversed the interlocutor of the session upon the point of civil right, it behoved them, necessarily, for the sake of justice, and for explicating their own jurisdiction, likewise to reverse the sentence of the court of justiciary, founded on the interlocutor of the court of session. And accordingly this judgement of the House of Peers has not been considered by the subjects of Scotland as a precedent for appealing from any sentence of death, or other criminal sentence of the court of justiciary.

One attempt was made in the year 1754, in the case of Macdonald of Barisdale, [N^o 63.], to bring an appeal from a sentence of death pronounced against him, upon the act of attainder passed in the 1746. The petition of appeal lay upon the table of the House of Peers some days ; and it is informed by those who had best access to know that case, that the Lord Chancellor advised with the Duke of Argyle, then Lord Justice-General of Scotland, the Attorney-General, and the Lord Advocate ; and they were all of opinion the appeal was not competent. It is certain the petition of appeal was ne-

* His Lordship says, he gives the history of this case from the record of the court of justiciary, as he had not the printed cases before the House of Peers. Being desirous to learn whether any objection had been stated against the competency of the appeal in the case for the respondents, I caused search be made for the printed cases in that cause, both here and at London ; but in vain. There is no collection of appeal-cases here that goes so far back. One that does was found in London, and examined ; but to no purpose : so that the probability is, there were no printed cases in that question.

ver moved: but-as the public justice was then appeased by former executions long before that time, and in respect of the most compassionate circumstances which attended that case, particularly the youth of Barisdale, and his plea of a *talis qualis* surrender to a justice of peace, in terms of the act of attainder, his late Majesty was pleased to respite execution of the sentence till his pleasure was further known; and Barisdale was afterwards pardoned by his present Majesty.

Every argument of expediency strikes against appeals such as that now under consideration. The public safety often depends upon the speedy trial and execution of criminals. The late statute of Geo. II. shows this to be the idea of the legislature. If every criminal in Scotland may appeal to the House of Peers against a sentence of death following upon the verdict of his country, or apply to his Majesty, during the recess of parliament, to respite execution, till he have an opportunity of presenting his petition of appeal, upon false and frivolous pleas, in arrest of judgement, over-ruled by the court, as in this case, the criminal justice of this part of the kingdom cannot proceed. Such appeals would be most embarrassing to the court of justiciary, and necessarily force them upon the study of a new system of criminal law and forms, which they have had no occasion to know or consider. And if such appeals be competent to the criminal convicted, they must also be competent to the private prosecutor, or the King's Advocate, when they apprehend they have reason to complain of the sentences of the court of justiciary. Many other difficulties must arise, which would render this new jurisdiction of the House of Peers inextricable, and hurtful to the due course of criminal jurisdiction, in which the public safety is so much interested."——

When Murdison and Miller's appeal was argued before the committee of the House of Peers, their counsel, in their pleadings, referred to all the cases which had been quoted by Mr Macintosh on the occasion formerly mentioned; but no regard was paid to them, partly because they were held to relate only to high treason and forfeitures, as to which the committee were of opinion there had been
some

some peculiarity in the common law of Scotland; but chiefly because none of them were in the proper form of an appeal, but all in the form of a reduction, which is a species of original action, in which new facts, and new proofs, can be admitted, that were not before the inferior court.

The committee did not enter upon the consideration of the constitution of the court of justiciary in ancient times, (when the counsel for the appellants thought they had clearly shown an appeal lay), but took up the constitution of the court at the Union, as affording a rule for all after times, and considered the constitution at that time as ascertained by consuetudinary law; which was deduced from two circumstances: *1mo*, The want of a single instance of a proper appeal in the records of the parliament of Scotland; *2do*, The practice of executing sentences in Scotland upon very short *inducie*, and the absolute necessity in many cases of executing them within three suns, which was held to be incompatible with the right of appealing.

This, however, did not appear quite satisfactory to some, who thought the first ground was only a negative kind of evidence, which could not abrogate a right that had once existed in the subject; and the second might, with equal propriety, be urged, to evince, that there was no such prerogative in the crown as that of pardoning after sentence.

The distinction made by our lawyers between remissions *ex gratia*, and those *ex justitia*, was urged in favour of the right of appealing; and some quotations were read, to show, that remissions *ex justitia* were obtained by the way of reduction in parliament. The distinction was acknowledged; and it was allowed, that cases might occur, in which a remission might be demanded *ex debito justitiæ*; but it was said, that since the Union, the King in council was the court in which this *debitum justitiæ* was to be made effectual.

The appeal, in this case of Murdison and Miller, was (it is informed) dismissed upon the general principle, That an appeal to the House of Peers, from a judgement of the court of justiciary, is in
no

no case competent, without distinguishing whether the judgement had proceeded on the verdict of a jury or not.

It is evident, however, that the latter part of the reasoning in the Lord Advocate's report, by no means concludes, that in *no* case should an appeal be received; and it is plain, either that the judgement of the House of Peers in the case of Elgin was wrong, or that in *some* cases an appeal is competent. Surely the court of session could not reverse, in order to *explicate its jurisdiction*, a judgement of the justiciary; neither could the House of Peers, if it had no appellate jurisdiction whatever in criminal cases. If it be once established, that an appeal is not *absolutely* incompetent, how is the line to be drawn, as there is no statute to regulate the matter?

In many cases, there is as much reason for receiving an appeal from the justiciary as from the session. Both courts may review the sentences of inferior judges, inflicting an arbitrary punishment without a jury. If the court of session review such sentence, it is certain an appeal may be entered against their judgement. Why then should it not be competent when the justiciary reviews such a sentence? The Lords of Justiciary are Lords of Session too; and if they be supposed fallible in the one character, why not in the other?

If this matter could be regulated by a statute, it certainly should. To allow appeals in every case would put an end to criminal jurisdiction in this country; but to reject them in every case, seems to be dangerous. The competency of an application to the crown, is not a sufficient answer: for the crown can only remit punishments; it cannot reverse a judgement of the justiciary sustaining themselves judges, when they have no jurisdiction; dismissing a libel that ought to have been sent to a jury; or absolving a person as innocent who had been found guilty by his country.

Besides, this answer takes it for granted, that the crown will always be uninfluenced and impartial. This may, and indeed must, be supposed of the House of Lords, which is the last resort in the ordinary course of justice: but it is incongruous in the eye of law, to suppose the crown impartial in any of the criminal cases brought

before the justiciary, as by the constitution it must be a *party* to every one of them; and in point of fact, it cannot be disputed, that in political times, the crown is not only apparently, but really interested, in criminal prosecutions. Suppose then, that a man has been brought to trial for his life by the King's Advocate for a political crime, or from political resentment, and that the jury has returned a *special* verdict, upon which the justiciary has condemned him to death; why should not that man have an appeal to the Lords of parliament? It cannot be refused him from respect to the verdict of a jury; for guilt has not been fixed upon him by the voice of his peers, but by the determination of judges. It cannot be refused him upon a supposed infallibility in those judges; for if fifteen Lords of Session be deemed fallible, six of them surely must at least be equally so. It cannot be refused him on account of the insignificance of the question; for the life of a man is far more precious than his property. It can be refused, therefore, only on this pretence, that he will obtain relief from the crown if he deserves it. But how can a man expect justice from his party, or mercy from his enemy? A jealousy of the crown has given birth to many forms, regulations, and decisions, which, but for it, never would, and never ought to, have existed. Surely therefore it should not be overlooked in this very important question, as to the competency of appeals in criminal matters. Many cases may be figured, in which appeals ought to be received; and therefore it were to be wished, that a statute could be framed, which would make way for them on proper occasions, and at the same time prevent such right from being abused: but that, it must be confessed, would be no easy task.

N. B. Murdison and Miller were executed in terms of the sentence of the court of justiciary.

Act. Adv. Solicitor, et alii.
sin, Crosby, Blair.

Alt. Lockhart, Macqueen, Rae, Wight, Macclausin,

N^o 90.

May 1773.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

CALLUM MACGREGOR *alias* John Grant.*Vicennial prescription of crimes.*

HE was indicted before the circuit-court held at Aberdeen in spring 1773, for the murder of John Stewart tenant in Aber-gairn, on the 25th day of December 1747.

He, in bar of the prosecution, pleaded prescription; and as this was an important, and hitherto undecided point, the advocate-depute deserted the diet, and the prisoner was recommitted upon a new warrant, in order that the question might be argued before the whole court at Edinburgh.

Accordingly he was transported to Edinburgh, and served with a new indictment.

When he was brought to the bar, his counsel stated to the court, That the pannel was not guilty, and had never betrayed any symptom of guilt; that a period of twenty-five years had elapsed since the alledged commission of the crime; during which he had lived in the country, and appeared in public, following his business industriously, and maintaining a fair character. He indeed had changed his name; but that he was obliged to do by law; and he once kept out of the way for some time for fear of being pressed: That he had never absconded, nor had a warrant been ever executed against him, (but it seemed to be admitted, that one had been taken out): That however conscious he might be of his innocence, and however certain, that he could not be convicted by fair proof, yet they thought it their duty to plead the defence of prescription, which arose from the showing of the indictment itself, the fact being charged as committed on the evening of the 25th of December 1747, no less than

twenty-five years and two months prior to his commitment in order to trial. And in support of this plea, they argued, That the Roman law, in all questions not fixed by the Municipal law, was part of the law of Scotland; Mackenzie, *Crim. tit. 1. § 3*; and that by the Roman law, crimes prescribed in twenty years. For proof of which position, they referred to *l. 12. C. Ad leg. Cor. de falsis*, "*Querela falsi temporalibus præscriptionibus non excluditur, nisi viginti annorum exceptione, sicut cætera quoque fere crimina;*" *Matthæus, De crim. tit. 19. cap. 4. § 1.*

Answered. The principles of the Civil Law are much esteemed with us, and are often resorted to in courts of justice; but it was never understood, that the prescriptions of the Civil Law were to be held the law of Scotland, without having been adopted by our legislature, or by usage.

The law of the code referred to, does not justify the opinion, that a vicennial prescription, as to crimes, was acknowledged by the Roman law. Had that been the case, it would have been laid down expressly and clearly under a proper title*: but the law relied upon, is found in a place where no person would think of looking for it, viz. under the title, *Ad leg. Corn. de falsis*. But further, the word *fere*, in the law referred to, clearly imports, that the vicennial prescription should only take place in falsehoods, as it did in most other crimes, without necessarily including the *crimina graviora*.

The doctors differ in opinion upon this question of the Roman law. *Carpzovius, par. 3. quest. 141. § 52.* asserts, That the vicennial prescription does not extend to parricide, affassination, and other enormous crimes; but that action against them is perpetual. That this is the case as to piracy, is clear from the following text: "*Eodem qui paricidii poena teneri possunt, semper accusatio permittitur;*" which Matthæus reconciles to his opinion in this manner: "*Semper id est vicennium usque quod in criminibus longissimum tempus esse nescitur.*" First, supposing the vicennial prescrip-

* So it would, had the compilation called the *Corpus Juris* been tolerably executed; but it is a confused, imperfect, and inconsistent mass.

tion to be universal as to all crimes, and then limiting the word *semper* to twenty years. But it is surely much more natural to suppose the law meant to distinguish between enormous crimes and lesser offences.

However, it is evidently a doubtful point, whether such a prescription took place in the Roman law; and therefore it is not to be supposed, our judges, however fond of that law, would adopt a disputed part of it.

Prescription is not mentioned in any of our ancient law-books. It was introduced by the act 1469, c. 28. as to obligations, and afterwards extended to personal and real rights. The punishment of murder was a part of the Common law, and treated of in our most ancient law-books; and its punishment fixed by statutes. If then the punishment of murder be a part of the Common law, and prescription merely the creature of statute, can it be thought, that a vicennial prescription of crimes, a matter of the first importance, would be received as part of our law, without being so much as mentioned in any statute, when every prescription, even the most insignificant, has been introduced by positive enactment.

Mackenzie, in his title, *Of prescription in crimes*, states it as a doubt, whether any such prescription is admitted with us; and, after giving the argument on both sides, concludes, "And to this opinion (that the vicennial prescription takes place) I *rather* incline." But he admits, that there is no instance of the defence being sustained; on the contrary, he says, crimes of an old date, *even after forty years*, have been punished. His opinion, therefore, considering how it is expressed, is of little consequence. Nor is that of Forbes and of Erskine of sufficient weight to introduce such a prescription. Fountainhall says expressly we have it not, 7th November 1682.

Upon looking into the records, several cases have been found, in which prosecutions were sustained for crimes committed at the distance of forty years. Thus Isabel Young, in 1629, was indicted for various acts of sorcery, or witchcraft, at the distance of forty years; she was found guilty, and sentenced to be worried (strangled)

(strangled) at a stake, and afterwards burnt to ashes on the Castle-hill. A like sentence was pronounced, 3d July 1629, against Alexander Drummond, who was accused and convicted of being a manifest forcerer "fifty years bygone." As also against John Brugh, accused and convicted of having been thirty-six years in the devil's service, &c. In 1644, the court found a libel relevant against Agnes Finnie, which charged her with being in continual society and company with the devil for twenty-eight years. In December 1649, James Wilson was sentenced to be beheaded for incest committed *about thirty-five years ago*. In April 1670, Major Weir and his sister were condemned, &c. (See N^o 1.). In April 1670, William Bruce was indicted for the crimes of theft, robbery, and murder, committed from 1640 down to 1661; the justices found the libel relevant, and the jury found him guilty. In September 1678, Isabel Elliot, and nine others, were indicted for witchcraft; Marion Veitch, one of them, is charged with having entered into the devil's service in 1650 or 1651, and the libel was found relevant.

By the law of England, there is no prescription of greater crimes, particularly murder. William Andrew Horne was convicted at the Nottingham assizes in August 1759 for the murder of a child in the year 1724. This is taken notice of in Smollet's history, vol. 3. p. 325. and in the Annual Register for the year 1759.—The law of God, upon which all our indictments for this crime are laid, is express against murder, and mentions no prescription.

As to expediency, much has been said on the part of the prisoner as to the danger of allowing trials to be brought at distant periods. If the trial goes on, the prosecutor will be able fully to justify his conduct in bringing the prosecution; but to state his reasons here would be unfair to the prisoner. He wishes the prisoner may be viewed in the most favourable point of light, that nothing may enter into consideration but the general question. If that be unsettled, and the court think they have a discretionary power of fixing it as they please, considerations of expediency may very properly be attended to: but the prosecutor cannot help thinking, that they strike
against

against this defence; for nothing can more contribute to prevent murder, and other heinous crimes, than a belief, that no length of time will expiate them in this world, and that punishment will be inflicted for them whenever they are discovered, at whatever distance of time. This seems to overbalance all the inconveniencies that have been figured. For his Majesty's Advocate, intrusted with the power of prosecuting *ad vindictam publicam*, can never effectually abuse that power, until the judges and juries in this country shall concur with him; which, if ever they have done, there is great reason to hope they will never do so again.

Replied for the pannel, The extinction of actions and obligations by the lapse of time, is founded in natural law; and accordingly it is taken notice of by all the writers on that subject. Our act 1649 is declaratory of the Common law. See Mackenzie's observations on it; Stair, b. 2. tit. 12.; Bankton, vol. 2. p. 165.—Prescription is treated of in several of our ancient law-books, particularly Balfour and Spottiswoode; and it is believed there are Common-law prescriptions in England.

The Romans had various prescriptions. We did not think proper to adopt all their distinctions; and on this account, perhaps, our statutes were made as to prescription in civil rights, founded on the general principles of the Roman law, but varying the mode of it. The *l. 12. C. Ad leg. Cor. de falsis*, is express as to the vicennial prescription of crimes. The word *fere* alludes to certain crimes which were extinguished by a shorter prescription, as adultery, peculation, &c. * The explanation given by Matthæus of the word *semper*, is supported by the analogy of civil actions, which were called *perpetual*, when they lasted thirty years; and Voet lays down the same

* So Sande and some other doctors pretend; but it is evident such is not the meaning of the expression. The long prescription of twenty years is contrasted in the law with the shorter prescriptions, which are called *temporales*. The law says, prosecutions for falsehood are not cut off by any of the short prescriptions, but only by the long one, by which almost all crimes are forfeited; consequently, it is clear the law acknowledges there are some crimes actionable even after that period.

doctrine, lib. 48. tit. 14. § 6.; Perezius, lib. 9. tit. 2. § 18.; Cujacius, vol. 4. Coll. N° 1338; Clarus Farinaceus Heineccius, lib. 44. tit. 3. § 370. &c.—Some of the exceptions mentioned by Carpzovius have a foundation in the Civil law; but he goes too far, when he brings in *crimina enormia* in general; for he gives no authority from the Civil law as to these, and he is condemned by all the other writers.

The law of France is explicit upon this point, *Journal des audiences*, vol. 5. 6th July 1703; in which case it was found, That the vicennial prescription took place, and was not interrupted by a sentence in absence, unless it had been executed by hanging the party in effigy. The reasons given are, “ *imo*, Parce que celui qui pendant un si long intervalle a porté son crime, et l’inquietude d’être
“ poursuivi, est réputé assez puni; *2do*, Parce que pendant ce tems
“ les preuves qu’il pouvoit avoir de son innocence peuvent avoir de-
“ peri; qu’au contrair un accusateur pourroit se servir de ce tems
“ pour pratiquer des preuves; et on presume toujours pour l’inno-
“ cence; on regarde comme favorable tout ce qui va à la decharge.” And the same judgement was given, 9th July 1706, and 26th August 1707. See too Le Maitre’s Pleadings, p. 507. and Dennifart’s Decisions, *voce* Crime.

The Roman law is one of the fountains of our jurisprudence; and in reality a part of it, where our own statutes and customs are silent; *Mack. Inst.* b. 1. tit. 1. § 7. & 41.; *Crim.* tit. 1. § 3. From which it appears, that the Civil law was the great rule with us as to crimes; and the article of Prescription of crimes, is one of those we have taken from it. Mackenzie has an express title upon this, in which he delivers his opinion very clearly; and to the same purpose, Forbes, *Inst.* vol. 2. p. 21.; Erskine, in his late treatise, b. 4. tit. 4. § 109. And it is remarkable, that every prescription introduced by statute in criminal matters has always been for a less period than twenty years; which shows that it has been reckoned the *prescriptio longissimi temporis*.

None of the cases quoted by the prosecutor impugn this doctrine.
Witchcraft

Witchcraft is a *crimen continuum*; and in such cases it has been held by some of the Civilians, that prescription cannot operate; nor was it pleaded in the case of Isabel Young, and other unfortunate women, who fell a sacrifice to the ignorance and prejudices of the times. But no case has been pointed out, in which a crime, consisting of a single act, such as murder, had been tried at the distance of twenty years from the time of its commission *.

Some authors hold, that prescribed acts may be brought in to aggravate other acts which are not prescribed; and accordingly such prescribed acts were only used as aggravations in the case of Macleod of Affint, who was tried in February 1674, though the prescribed acts were by much the most important in the charge. Fountainhall, in the passage quoted by the prosecutor, is not treating of this question *ex proposito*, but the observation is thrown out in a superficial manner.

As to the law of England, appeals of felony, at the instance of the private party, prescribe in a year; Blackstone, vol. 4. p. 130. & 311.—The only other form of trying crimes is by presentment, or indictment, upon the previous finding of a grand jury; and generally, in the case of murder, there is another previous finding by the coroner's inquest. These checks against improper prosecutions, made it not be thought necessary in England to have any express limitation of criminal suits. At the same time Wood, in his Institute, b. 4. c. 4. says, "It is to be wished, that in criminal cases at the suit of the King there was a limitation of time for prosecution, especially in cases of life and death." But in Scotland the King's Advocate has an unlimited power of prosecution; and therefore, if the lawyers of England, where there are so many checks, with for limitations, much more should those of this country.

The object of criminal prosecutions has now long been the prevention of future crimes, not the gratification of private revenge;

* It was in the case of Dodds, 20th August 1663, for murder; but then indeed he had been outlawed.

but this object of criminal jurisdiction cannot be attained by bringing trials at a great distance of time, after the offence has been lost in oblivion, and the supposed criminal has lived for many years a decent, inoffensive, and virtuous life. The divine precept alluded to by the prosecutor, means no more than that murder is capital; a proposition which was never disputed.

The dread of punishment is no doubt one great cause of preventing crimes; but the question is, Whether it be not sufficient for that purpose, that the operation of this dread not only takes place before the commission of the crime, but must continue for the long period of twenty years after? and whether there are not reasons of expediency that overbalance the consideration just now mentioned? A person who has lived twenty years under the load of guilt, has in reality suffered the most excruciating punishment; and, as Mackenzie says, it would be punishing him twice to bring him to trial after that period. A man may fly from public justice, but he cannot from himself. Cain was punished by putting a mark on him, to hinder him from being killed, in order that he might suffer the more.

If, on the other hand, the accused person is supposed to be not guilty, the consequences may be dreadful, if prosecutions were allowed at any distant period. A man may not know that he is suspected. He may lose the memory of facts essential to his defence; witnesses may die, may go to distant countries, or may forget circumstances; so that it may be impracticable to prove *alibi* at a distant period. Nor is it enough to say, that the chance is equal on both sides, because the prosecutor may lose his proof also. This is an additional argument in favour of the prescription; because it points out an additional inconvenience from allowing prosecutions at a great distance of time. Besides, it is a mistake to say, that the chance is equal; for the prosecutor may lie by until the exculpatory witnesses are dead; he may take his own time: whereas no innocent person, not actually in prison, ever thought of going to a court of justice, and desiring to be prosecuted. If it is expedient that the
subjects

subjects should be quieted as to their properties and civil rights, after the enjoyment of them for a reasonable time, how much more so is it that they should have a similar security for their lives?

To make this the law of Scotland did not require the aid of a statute, as it is the established law of nations, and a fundamental rule in the Roman jurisprudence; which, especially in criminal matters, is the great foundation of ours. The want of a statute would go to this, that no length of time would afford a defence. A man at the age of eighty might be tried for an offence committed when he was fifteen. The age of a patriarch would not exempt him. Nay, posterity itself would not be safe:—Some crimes are triable after the party's death, such as suicide.—His Majesty's Advocate may bring a trial of this kind for a fact committed some hundred years ago, in order to forfeit the family of the supposed delinquent of the moveables that belonged to him. If we have not a vicennial prescription, there is no end or limitation of prosecutions.

O P I N I O N S.

AUCHINLECK. Question new, and extremely nice.—There is not, properly speaking, a prescription here to take away the man's guilt; that must remain. But though the law of God be general, "That whosoever sheddeth man's blood, by man shall his blood be shed;" yet exceptions are admitted in all civilized nations; such as accident, self-defence, or slaughter in the field of battle:—therefore competent for a man accused of murder to plead such defence, or defences of another nature, such as *alibi*.—In justice to our fellow-citizens, it ought to be required, that prosecutions should be brought within such time as that the person accused may be able to avail himself of these defences.—Self-defence, for example, may have been seen by few, and these old people; and the pannel might have proved it, had the prosecution been brought in time, but not otherwise.—No statute that applies to this case but the statute of common reason and humanity.—Do not consider this as a prescription, but as a

rule of justice. The pannel denies his guilt; and it is plain, by reason of the delay, it may be difficult for him to prove his defence.—No precedent.—Witchcraft, &c. *crimina continua*. And though our predecessors had determined otherwise, we should proceed on the principles of reason.—Clear, that prosecutions ought not to last for ever: the question, How long?—We have here both the relations of the deceased and the public prosecutor; both of them would make the proper inquiries at the time: presumption, therefore, that they did not think it proper to bring a prosecution; possibly because they found the homicide was committed *se defendendo*.—Present Advocate may have been satisfied that this man was guilty, but he could not have an opportunity of examining all the proofs that were to be had twenty-five years ago.—Can figure times when the spirit of government may be to push penal statutes against the subject.—Attending conventicles, &c. Consequences dreadful of not fixing a period in case of a bad government and bad ministers. When we have no law of our own, we have recourse to other laws, assimilated to our own, particularly the Roman law.—Limitation by the French law, *Morceau's Recueil des quelques notables arrêts*.—Carry it even the length of denying action for the goods said to be robbed.—Law of England so particular, that cannot follow their practice.—Has certain guards against improper prosecutions.

KAMES. Do not say that a prescription is here fixed, but take this case as it stands.—*Diffimulatio* may be applied even in deep crimes.—What must be law for this, must be law for theft.—It is to be presumed, that the prosecutor thought this an improper example, on account of certain circumstances. If that be so, will not allow him to take it up at the distance of thirty or forty years. But what weighs chiefly is this, a crime not indelible. The criminal repents, and lives a good life.—Suppose a sin purged off by length of time.—The same applies to crimes. If he abscond, or be fugitated, and nothing done to show that he was restored into society, may still be tried.—But the present case different.—Case of a gentleman who committed

a robbery in despair, got a pardon, and afterwards became a member of parliament.

PITFOUR. In all criminal cases care should be taken that parties be on an equal footing.—Much of this must depend on time.—If prosecution delayed, it must be owing either to inability or negligence.—Thence strong presumption of innocence.—Delay of twenty-five years sufficient to infer presumption that proofs are lost.—If this not sufficient, sixty or seventy years not sufficient, which would be gross.—Twenty to one against the prisoner, that he cannot bring his proofs, and therefore ought to be secured.—Am now reconciled to this prescription, though at first had some difficulty.—Thought of making a distinction between crimes atrocious, and those that are not so.—But upon thinking of it, finds the rule must be the same whatever the crime be. Besides, no room for a distinction, because no law. This however may be considered by a legislator, though not by a judge. If no limitation in this case, none with regard to the most trifling offences.—The have no prescription but by statute; yet careful not to give up this great *presidium* of their lives and liberties.—English law not founded upon principles such as we go upon. Prosecution extinguished, no matter whether the word *prescription* be used or not.

COALSTON. Had the pannel absconded, or been fugitated, he could not have pleaded this defence. But the question is, Whether can a man that has appeared publicly for twenty-five years, be prosecuted?—It applies to all crimes of whatever degree, and any distance of time. Matter of serious consideration.—It is the practice of all the nations in Europe, to fix a limitation, and not by statute, but by the reason of the thing. This has great weight, especially when founded on principles of reason.—Crimes incident to youth:—Suppose a prosecution brought for a riot on the street forty or fifty years ago.—Treason one of the most atrocious of all crimes. In the end of the last century, very few gentlemen in public life who might not have been prosecuted for it.—Impossible to have a fair trial after such a distance of time.—*Alibi*.—Parties not *in pari casu*.—Not in the power

power of an innocent man to force on his trial.—If the prosecutor loses his evidence, it is his own fault.—Independent of any statute, would not have sustained action upon an obligation at the distance of three or four hundred years.—Taciturnity a strong plea in law, independent of statute, and listened to in questions as to bills.—Claim for the *jus relictæ*, at the instance of the widow's executors, repelled at the distance of twenty years. No damage can arise by sustaining the defence, and must make the rule general.

KENNET. Highly expedient there should be a limitation: without it, even innocent people may be in danger, and the guilty laid under disadvantages. Besides, there is something in nature that revolts against prosecuting a man after he has lived virtuously. Prosecutor may always stop the prescription.—If the delay be owing to the guilty person's own conduct, he cannot plead it.—In England, they do not borrow from others:—we do.—The Civil law a compass to go by.—Case of William Bruce the only one that points the other way; but even in that case, continued acts were charged.—Case of Affint is of some weight for the pannel. Roman law goes on that footing. No precise law for prescription, but universally taken for granted.—Expediency, too, comes strongly in.

JUSTICE-CLERK. This court established on its present footing in 1672; yet not one instance of a prosecution after twenty years from that time to this;—yet highly presumable that instances of the like nature must have occurred.—Of great importance to settle this point.—No competition between the general security and the punishment of a single criminal at the distance of twenty years.—In this case, there is no charge of lying in wait or forethought felony; but only, that having conceived malice, &c. which was necessary to found the indictment.—No warrant executed.—No precognition taken at the time.—Looked the records myself, and no precedent for such a trial. Question quite entire; therefore arguments of expediency strong for the defence.—Law pays great attention to the just defence of pannels. If such prosecution competent to the public, it must be equally so to the nearest in kin of the deceased.—The private prosecutor may be supposed

supposed to have watched his opportunity.—Not enough to say, that proper persons are, and have been in office.—It is the same in France, where they have nothing in view but to do justice.—We certainly are in a happier situation as to security.—Law cannot be perverted here: but times may alter; and it ought to be out of the power of any officer to affect the security of the subject. Act 1701 goes upon the plan, that prosecutions were not to lie over.—Clear, that sentence of fugitation would have interrupted the prescription. In that case, the prosecutor did all he could to bring on the trial; and the delay was owing to the person accused himself.—No statute but must go on principles of common law.—The Roman law a great source, and applies particularly to criminal matters.—In civil matters, every question almost has been settled by decisions and practice; but criminal questions do not occur so frequently.—No law against simple adultery.—A general title in our law-books, comprehending various crimes.—Stellionate:—Our statute 1540, c. 105. about a particular species of it, and refers to the common law.—Unanimous opinion of all the great commentators on the Civil law, and doctrine of all the laws of Europe, except England.—Prosecutions brought on the principles of the Roman law without statute: why then not sustain a defence for the prisoner founded on that law, or on expediency?—In England, nothing but statute governs.—Cannot adopt their law, without regard to their securities.—Case of those who put Porteous to death a striking case. The memory of their guilt obliterated; yet in that case there was a deliberate plan of murder.

COALSTON. Interlocutor ought to be guarded.—Fugitation.—Effect of it would have lasted till the party accused surrendered himself to justice.

Aug. 9. 1773. The court, after the hearing, ordered informations; and on advising these, pronounced this interlocutor: “In respect it does not appear that any sentence of fugitation passed against the pannel, sustain the defence, and dismiss the indictment.”

Adv. Montgomery, et alii.

Alt. Ilay Campbell.

There

There seems to be good reason for questioning the justice of this decision; and that may be done with the less diffidence, as a contrary opinion was given by some of the judges not many years ago. Some of the grounds of doubt shall be stated, or rather hinted; for it would require a treatise fully to explain them all, and discuss every point that has been touched upon in the reasoning on this case.

The law of nature *, and the statutes and customs of Scotland, are alone obligatory upon its inhabitants. By these they must regulate their conduct. If they transgress these, they are punishable: but they are not punishable though their actions be disconform to the enactments of the Civil law, the Canon law, or other foreign laws, unless these foreign laws have been, by some act of adoption, assumed into the law of Scotland. Had our legislature meant, that the Civil law should be holden to be the law of this country, excepting in so far as derogated from by express statute, it surely would have been at pains to make that law known to the people, by first translating, and then notifying its dictates to them; but neither was ever done: so that it is impossible for our people to square their conduct by the Civil law; for this plain reason, that it is not intelligible to them, being written in an unknown tongue. The same holds as to the Canon law, and the law of other realms.

At the same time, as many of the Roman lawyers, of whose works some part has been preserved in the *Corpus juris*, were men of great learning and genius, their reasonings have a good title to attention, and their opinions to respect. Hence the Roman law may, with great propriety, be quoted, in considering abstract points: neither can it be disputed, that the positive enactments of Rome, and every other well-governed realm, may be referred to, either in support of

* Indictments have been sometimes laid upon the law delivered as from God to the Jews by Moses. In N^o 56. the indictment is laid singly upon it, and concludes for a capital punishment, though we have no statute against the crime in this country; but then the crime charged is against nature.

similar regulations, which we already have, or as precedents and arguments to induce our legislature to make similar regulations, if we have them not: but it is impossible to maintain, that the Roman law *qua fuch*, is obligatory in this country.

Some old indictments are laid upon it, and some upon the Canon law; yet even these indictments are not rested upon such foreign law; they are grounded also upon the law of nature and of God. See N^o 1. Our indictments are almost always laid upon the laws of other well-governed realms; yet surely it will not be pretended, that the people of this country are obliged to know the laws of all other well-governed realms. The truth is, that with us every man is presumed to know the law of his own country; but every man, even the lawyer and the judge, is presumed to be ignorant of the law of foreign countries, which to our courts of justice is a question of fact; and when they must follow it here, it is proved to them by the opinions of the lawyers and judges in those countries.

It is next to be considered, whether this vicennial prescription of the Roman law has been by any act of adoption assumed into our law *. It is admitted we have no statute for it nor precedent; all we have is the opinion of Mackenzie, Forbes, and Erskine.

But the opinion of lawyers, unsupported by usage and precedent, does not make law; and no stress can be laid on the three opinions referred to. That of the first can claim but little authority; that of the second none at all; that of the third is respectable, but he was a contemplative, not a practising lawyer; neither did he pay the same attention to the criminal law that he did to the other branches of jurisprudence; and at any rate, a single opinion is but a frail support.

On the other hand, the decisions quoted by the Advocate, point strongly against this prescription; and Wilson's case is a precedent in

* It is supposed in this argument, that murder fell under the vicennial prescription by the Roman law; of which, however, there is not sufficient proof. See the note on p. 599.

point. It does not indeed appear whether prescription was pleaded in that case; but if it was not, the omission shows, our lawyers at that time had no notion of it. Fountainhall, too, is explicit against it. The answer attempted to his authority, That he talks of this point only in a cursory manner, is quite insufficient. Had he been discussing an abstract and difficult question of law, the objection would have been good; but as he is talking of our practice as a *matter of fact*, his assertion is the more weighty that it is concise, as it shews he took it to be a clear and indisputable position.

But what evidences the sense of the nation more forcibly than a hundred opinions could do, is the common proverbial saying, *Murder will out*. This proves, *1st*, a general belief, that Providence interposes in a particular manner to detect this crime; *2dly*, that this crime would be punished, at whatever distance of time it may happen to be discovered; for what would signify its detection without punishment?

But further, I have been well informed, that the quinquennial prescription has been often pleaded before the commissaries of Edinburgh in defence against processes of divorce on the head of adultery; and that it has been always over-ruled, upon this principle, That the Roman prescription of crimes did not take place in this country.

I have seen one case in which it was so judged, viz. the process of divorce on the head of adultery, at the instance of the Earl of Monteth against his lady, July 9. 1684. After a condescendence (particular) had been exhibited against the defender, she preferred a petition, pleading, *imo*, " That all differences between the Earl and
" her had been taken away by a voluntary agreement in 1679; by
" which the Earl became bound to pay L. 1000 Scots for her ali-
" ment; and this contract, she insisted, ought to have the effect of
" a tacit if not of an express renunciation, so as to sopite all faults
" prior to its date; and therefore no question could be put as to a-
" ny alledged crime prior to it.

" *2do*,

"2do, As to all acts five years before the date of this summons, they were cut off by the quinquennial prescription, *l. 5. C. Ad. leg. Jul. de adult.* and all the lawyers on this subject, *Farinac. Clarus, Carpz. Pap. l. 24. arrest. 2.*; and where we have no special law, that of the Civil law takes place with us; and therefore craving, that the said defences might be sustained separately relevant."

Ans. "To the first, The said agreement does no wise import a reconciliation, but it is rather an evidence of a voluntary separation; and the Earl could not but aliment his lady while she stood undivorced; and though he then suspected her of the crimes libelled, yet he had not then got full proof, such as he could venture an action of divorce upon. To the second, That the prescription of crimes that were by the Civil law, do not obtain with us; and it would be absurd in the case of adultery, which being a latent crime, might remain undiscovered for five years."

The commissaries, in respect of the answers, refused the bill," (petition*.)

Since then we have no law or precedent for this prescription, it is plain, that expediency alone can be urged for it; and accordingly upon that, and that only, the judgement went.

Here the first question that occurs is, Can a court of justice cut down a right of action the law has given to the private party, and to the public, upon expediency alone? Had experience proved, that expediency required such actions to be limited by a short prescription, that might be a good reason why the legislature should strike in, and shorten the duration of such actions; but upon what principle can a court of justice take such liberty with a private and a public right? The court of session, not long ago, found they could not do so, Dec. 2. 1766, Mackechnie against Wallace †.

It

* This decision is taken from a MS collection of consistorial cases, compiled by a gentleman lately deceased, who was one of the judges of the commissary-court.

† The case was as follows. Mackechnie sued Wallace for alledged usurious exactions

It has been said, That a bond or bill which has lain over for a great number of years, would, and ought to be cut down, independently of any statute.

To this it is answered, That neglect for a great number of years, on the part of the creditor, does, independently of any statute, afford a *presumption*, that the bond or bill has been paid; but such neglect, independent of statute, would afford no ground for cutting down the obligation, if it was offered to be proved by oath of party, or otherwise, that it was still a subsisting debt; and this is the precise doctrine of the decisions as to bills. From lapse of time, and other circumstances, the court of session very often presumes them to have been paid; and therefore denies action on them, though forty years

tions in 1758, 1759, 1760, and 1761; and insisted for the penalties in the act 12^o Ann. It was pleaded in defence, This penal action is prescribed by 31^o Elis. c. 5. which provides, That all actions upon penal statutes, made or to be made, must be sued within two years after committing the offence, when the penalty is appropriated to the crown; and when it goes to the crown, or other prosecutor, the prosecutor must sue within one year, the crown within two years after. In this case the summons was not served upon the defender till December 1762; so all the alleged offences, save that in May 1761, are cut off both as to the crown and private party, and even that in 1761 is cut off as to the private party. Answered, The act 31^o Elis. is an English statute, which cannot operate *extra territorium*; consequently cannot affect the rights of the people in this country, the law of which acknowledges no limitation of actions but that of forty years; and this very point was so decided, 19th January 1737, Cowan; Dict. *voce* Foreign. Replied, It is absurd and unequal, that an offence created by the British legislature should remain actionable for a longer time in the one country than in the other. It is clear the act of Elisabeth applies to all subsequent statutes in England. It is equally clear the act 12^o Ann. did not mean to make a distinction between the subjects of the different countries; and therefore this clause in the act of Elisabeth ought to be considered as ingrossed in 12^o Ann. and every statute of the same kind. And such is the opinion of Lord Bankton, ii. 188. and Mr Erskine, iv. 4. 65.; and so it was decided, 13th January 1747, *Booksellers of London contra Those of Edinburgh*, reported by Falconer.

The court thought, that a law should pass, putting both countries upon the same footing as to this matter; but that they could not take upon them to do so by a decision; and therefore, by a very great majority, the defence was repelled.

Ast. D. Dalrymple.

Alt. Lockhart, Maclaurin.

have

have not run from their term of payment; but if by the oath of the acceptor still living, or other good evidence, the presumption arising from the lapse of time be taken off, action is sustained at any time within forty years. In the case we are now treating of, innocence cannot be presumed, because a proof of guilt is offered; and therefore the indictment cannot be quashed upon that presumption, but only upon a prescription, cutting down the right of action.

Lastly, As to expediency, upon which it is plain the judgement proceeded, is it clear, that it cannot be urged on the other side of the question?

It is obvious, that the argument from the presumption of repentance and amendment, and so forth, is out of the case: for the judgement establishes, that he against whom sentence of fugitation has passed, cannot plead prescription; but a man may repent and amend abroad as well as at home; yet he who is outlawed must suffer if he returns: and justly; for there are some crimes, at least there is one crime, which even the finger of time cannot obliterate, nor the tears of repentance wash out.

The argument from expediency, in favour of the judgement, then, comes to this: The Advocate may abuse his office: he may harass the subject with prosecutions at a great distance of time for trifling offences; or he may delay prosecutions for heinous offences, till he knows the person accused has lost the proof of his innocence.

To this it is answered, *first*, That it is not pretended in the argument for the decision, that there has been any instance as yet of such improper prosecution: why then presume, that an abuse will be committed in future times, of which the past afford no example? *Presumptio est conjectura ducta ab eo quod plerumque fit.* There is but a bare possibility of such abuse. On the other hand, it is certain and notorious, that many foul murders have been committed, which no investigation has as yet been able to bring to light, though more than twenty years have elapsed since their perpetration.

But, *2dly*, All these fears and apprehensions are groundless, because the jury is a sufficient check; not to mention the crown, in
case

case the jury should go wrong. No man can deny that a long delay of the prosecution is a material circumstance in every trial. All that is here contended for is, that it should be sent to the jury with the rest of the case. If the proof be not clear as the meridian sun, if there be a possibility of innocence, the jury should bring off the pannel. Further, if judges cannot, the jury can distinguish between atrocious crimes and lesser offences; and they ought to do so *. In many cases, it would be as improper to bring the offender to trial at the distance of seven as of seventy years; *e. g.* in rape, bribery, &c. The jury, therefore, is the only proper security against too long a delay: The pannel is always safe in the jury's hands, unless he has been guilty of an atrocious crime, and the proof be perfectly clear, and exclude the possibility of innocence. If such be his case, he ought to suffer. Prescription was first introduced to quiet mens minds, and secure *bona fide* purchasers: but the mind of a murderer ought never to be quieted; he can never come to be *in bona fide*.

The common saying above mentioned, tended not a little to deter men from murder, which is the most atrocious of all crimes †; and therefore, whether the belief of divine interposition, in cases of murder, be well founded, or a vulgar error, it is certainly to be regretted, that any thing should have been done to diminish its influence, as it was unquestionably attended with good consequences. To conclude, It is evident the judgement, in this case, was pronounced from the best motives, an anxiety to prevent vexatious prosecutions,

* The jury are unquestionably, by the law of this country, judges of the law, as well as of the fact. See Introduction, sect. 2. Now, if they may control the Common law, it follows, that they may Statute law also; for this last is not more obligatory than the other.

† Treason is only politically so; which is plain from so many gentlemen having committed it, as taken notice of in one of the opinions.

Aug. 1773.

The KING against MACGREGOR.

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and the possibility of endangering innocence : but, nevertheless, there is some reason to think it deserves to be reconsidered ; for though it continues the severity of the law against the impetuous and the imprudent offender, it must sometimes afford protection to the cautious and the cunning villain, who *watched his opportunity*, lay in wait for his adversary, and slew him *with guile* and circumspection.

ADDI-

ADDITIONAL CASES.

N^o 91.

March 3. 1712.

Her MAJESTY'S ADVOCATE,

A G A I N S T

Mr JAMES DUNDAS Advocate.

Leasing-making.—Sedition.—Asserting the Pretender's right, &c.

THREE libels were executed successively against the pannel, all of them of the following tenor.

“ That where, by the law of God, and the laws of this and all other well-governed realms, every soul ought to be subject unto the higher powers, as ordained of God, and none ought to revile or curse the ruler of the people, but all ought to submit themselves dutifully to the ordinances of man, for the Lord's sake, whether it be to the King, as supreme, or to governors, as unto them that are sent by him; and all ought to honour the King: Likeas by the laws and acts of parliament it is statute; and first, by the act of parliament King James I. parl. 2. cap. 43. That leasing-makers, and tellers of them, to the engendering of discord between the King and his people, tyne [forfeit] life and goods to the King; which, by the act of parliament, Ja. V. parl. 6. cap. 83. is extended to such as make evil information of the King to his lieges, as well as to those that make leafings to the King of his lieges: Likeas by the act of parliament, Queen Mary, parl. 6. cap. 60. speaks of unreasonable communing, to the occasioning of conspiracy against the Prince, or of sedition, are to be punished at the Queen's pleasure: and by the act of parliament, Ja. VI. parl. 8. cap. 134. all such as, privately or publicly, in sermons, declarations, or otherwise, utter slanderous or untrue speeches, to the reproach of his Majesty, his council, and proceedings,

proceedings, or to the dishonour and hurt of his Highness, or who meddle in the affairs of his Highness, and his estate, present, by-gone, and in time coming, are to be punished as leasing-makers: and by the act of parliament. Ja. VI. parl. 10. cap. 10. it is statute, That none depreciate his Majesty's laws and acts of parliament, nor misconstrue his proceedings, to the moving of any strife betwixt his Highness and his subjects, under the pain of death: And all these acts ratified Ja. VI. parl. 14. cap. 205.: And these acts also extended against the authors and publishers of slanderous speeches or writs of the estate, people, or country of England, or any counsellor thereof, to the hindering the then intended union, or whereby hatred may be fostered, or misliking raised, between his Majesty's subjects of this island; and all such are ordered and ordained to be severely punished in their persons and goods at his Majesty's pleasure, Ja. VI. parl. 22. cap. 9.: Likeas by our act of parliament 1703, cap. 4. it is ordained, That for hereafter the crimes above mentioned shall be punished by fining, imprisonment, or banishment; or if the transgressors be poor, corporally: Likeas by the first acts of the parliament 1702 and 1703, our royal power and authority, and our undoubted right and title, are fully asserted and recognised. And further, by the Common law, as well as by the foresaid laws and acts of parliament, injuries, slanders, reproaches, and defamations, to the engendering of discords between the King and his people, or the occasioning of conspiracy against the Prince, or of sedition, or to the dishonour or hurt of his Highness, or to the moving dislike between his Majesty and his subjects, may be done, perpetrate, and committed, not only by words and writing, and printing, but also by things themselves, as scandalous, seditious, pernicious medals, pictures, or the like, with their disloyal and wicked inscriptions; and the actors or accessories to the said crimes, so committed, ought to be severely punished by the pains of law. Nevertheless, it is of verity, That you, the said Mr James Dundas Advocate, is guilty, art and part, of all and every, or one or other, of the foresaid crimes: In sua far as the said Mr James Dundas, shaking off all fear

of God, and regard to us and our laws, did first upon the 30th, or one or other of the days of June or July last bypast, in an extraordinary meeting of the faculty of Advocates in Edinburgh, where a medal of the Pretender (the very same, or like to that which is now consigned in the clerk's hands, that Mr Dundas may see it) was brought, and presented, and noticed in its inscriptions and mottoes, which were, the island of Great Britain and Ireland, encompassed with the sea, and ships, on the one side, with the motto *Reddite*, and having on the reverse a face, said to be the Pretender's; that is, the person pretended to be the Prince of Wales during the life of the late King James, and since his decease pretending to be, and taking on him, the style and title of our dominions, with the motto *Cujus est*; and which medal was said to be presented to the Faculty by the Dukes of Gordon, to be put in the collection of their medals: the said Mr James Dundas did then, and there, not only contend and plead for the same, but though it was by some objected, That the medal was injurious to, and reflecting upon us, and our right and government; yet he opposed, and alledged, That being the medal of the Pretender, who had the right of blood, and which right he said was good, or words to this purpose, it ought to have been received, and the opposition made to it by mushrooms or scoundrels, or words to this purpose, ought not to be regarded; and so it was in a manner acquiesced to by the meeting, that the medal should be received, and thanks returned for it: Which practice of Mr Dundas, upon the matter, and according to the nature of the thing, was a most scandalous, seditious, and pernicious, reproach upon us, our government, and right thereto, tending to the engendering discord between us and our people, and to occasion conspiracy or sedition against us. Likeas it also was a most criminal reflection upon, and misconstruing of, the proceeding of us and our parliaments for settling the succession, contrary to the very oath of abjuration that he the said Mr Dundas had taken, and clearly tending to move dislike between us and our subjects. But the said Mr Dundas, not resting in this his wicked practice, hath, upon one or other of the
days

days of August last, further proceeded to the making or publishing of a most scandalous, pernicious, and seditious pamphlet, under the title of *The Faculty of Advocates loyalty, in a letter to us, by one of the Dean of Faculty's council*. Which pamphlet, and most infamous libel, is a heap of lies, villanies, and mischief; whereof his written copy, with the printed copy printed by his order, and so published, is put in the clerk of court his hands, that he may see it; and a double also of the same, held as here repeated, and given out to him to answer: As, first, and in the first paragraph thereof, where, abusing a very tender and sacred principle and position of government, as to non-resistance, he stretches the same most wickedly and maliciously to the condemning of the late happy revolution; and then proceeding, he villanously reflects upon the very first happy times of our reformation from Popery, directly accusing both our noble regents and worthy reformers, and also the English, then our friendly assistants, of rebellion and tyranny against the then Queen Mary; adding, that after her decease we submitted to the next in blood; but then he plainly asserts, against our right and title, and the succession to the crown, as now settled by act of parliament, that relation, kindred, and the rights of blood, are so sacred, that no crime, nor no power on earth, could take them away: Thereafter he goes on with his malicious strictures upon the times of the late King Charles I. and upon things long since happily buried by several acts of indemnity, and that not without most rude reflections on the English as cowards: and where, in a word, he makes the whole English nation either professed Jacobites, that is, enemies to us, or such villains, as he calls them, as to profess only loyalty in shew, when they are at the bottom abominable hypocrites, false friends, and traitors. Then he goes on to reflect again upon the late happy Revolution, which he reckons no better than a curse, and the late King William, of ever-glorious memory, no better than a Nebuchadnezzar; and that to him we were all made slaves; and thence he takes a new flight against the late King William's memory, whom he falsely accuses of alienating the bishops rents to profane uses,

of giving us ignorant and villainous judges, (though Mr Dundas his own father, a person of probity and merit beyond exception, was one of them), exhausting Britain of money, carrying our countrymen abroad to be killed in time of war, and ordering them to be starved in time of peace; and after the example, as he says, of that abominable monster Nero, who, beside his inhumanity to his parents, burnt with joy the city of Rome. And he further accuses the said King William of prostituting the honour of the nation; and all along he treats his government as a foreign yoke. But then he goes on to accuse and slander us who now reigns, for continuing, contrary to law, as he alledges, King William's parliament, though it was both warrantable, and approved by an express act of parliament; whence he proceeds to condemn the union of the two kingdoms as a fatal blow to our laws, and the finishing subversion of our constitution, in laying an embargo upon our trade, divesting the Peers of their hereditary right, diminishing the parliamentary representation of the Commons, and surrendering the whole power and sovereignty of Scotland into the hands of a more powerful people, our old enemies of England; and not stopping in his reflecting upon, and reproaching the Union, he goes on to reflect upon the proceedings of us and the British parliament, by abrogating part of our laws, though infinitely better, as he says, than those of the English, and introducing the English laws about treason, in place of ours, which he also falsely makes a breach of an article in the treaty. And then, taking notice of the appeals that lie from the Lords of Council and Session to the British parliament, he roundly reproaches the whole House of Peers, as men who can scarce be presumed to know either law or equity; adding further another false insinuation, as if our representatives were, contrary to the treaty of Union, ranked after all the counties and boroughs of England. Nor doth the kingdom of Ireland escape his unaccountable malice and reproach, when he calls it a receptacle of English slaves, and a conquered province, unjustly preferred to Scotland. And further wickedly adds, to the manifest engendering of discord, and moving of dislike,

dislike, that all overtures for the good of Scotland were refused. After all which he most absurdly concludes for the loyalty of the Advocates; though they had received a medal of the Pretender, from no better arguments than his own pernicious and wicked reflections above remarked. By all which it is manifest, that the said Mr James Dundas is guilty, art and part, of most seditious and pernicious practices; as also of a most wicked, villanous, seditious, and pernicious pamphlet, and defamatory libel, contrary to the foresaid laws and acts of parliament. Which being found by a verdict of an assize, before our Lords Justice General, Justice-Clerk, and Commissioners of Justiciary, he ought to be, by their sentence, severely punished with the pains of law, to the example and terror of others to do the like in time coming."

Sir James Stewart, his Majesty's Advocate, produced an order, signed by Lord Dartmouth, one of the secretaries of state, to prosecute.

Pleaded for the pannel, The prosecutor can only insist upon one of the libels, and the other two must be dropped; for the pannel cannot be obliged to answer to three libels upon the same fact at once, as that might produce three sentences against him, *l. 1. § 3. ff. De accusat.; l. 11. § 2. eodem.* The list of the assize is only given out with the first libel; and therefore if it be passed from, there can be no trial. If the other two are passed from, the additional list of witnesses given out with them must go for nothing. *2dly*, The libel holds the pamphlet as repeated, or a part of the libel; it ought therefore to have been given out with the summons and citation; for no part of a criminal libel can be left in the clerk's hands more than another.

As to the first branch of the libel, which charges seditious practices, the facts charged are not relevant; because, first, by no law is the receiving such a medal forbidden; consequently the argument for receiving it could not be a crime. As to the pretence, That the medal asserts the Prince of Wales's right to the crown, there is nothing on the medal which directly asserts that right; so that even the
corner

corner of the medal could not be the ground of action: and it is without precedent to punish for a pretended meaning when nothing is expressed. *2dly*, Supposing the medal asserted the Pretender's right, no law prohibits the keeping such medal, any more than the keeping or using a book that maintained that or any other bad principle. The 134th act, Ja. VI. condemns Buchanan's Chronicle; yet those people who kept it in their possession never were punished. In France, the having British coin, which asserts our Sovereign's having right to that kingdom, was never reckoned punishable. *3dly*, As to the assertion, That the Pretender had the right of blood, or words to that purpose, in the 1st place, this is too general, and *in criminalibus non licet vagari*. *2dly*, The using such expression is not pleading against her Majesty's right to the crown; for her Majesty's right is not incompatible with another's having what may be called the right of blood; for blood alone gives no right to the crown; it gives a title, if the person that has it be not debarred by the want of other qualities, which our laws require. Thus many are nearer by blood to the succession than the house of Hanover; yet it is called before them, and they are excluded, because of their want of other qualities. Hence the saying, that the pretender had the right of blood, was only saying, he was a near relation to the Queen: but it did not import a denial of her Majesty's just right to the crown; and therefore the argument for receiving the medal upon that ground, cannot be criminal, though the argument might be inconclusive.

As to the second branch of the libel, founded on the pamphlet: In the 1st place, The mere composing a pamphlet, without publication, is no crime, more than the speaking in private where no body hears. Writing, without publishing, can never occasion sedition. The act 131. parl. 8. Ja. VI. relates to open public speaking; the act 10. parl. 10. Ja. VI. to slanderous writings; by which such must be understood as occasion a misunderstanding between the King and his subjects. The act 1662 means the same, and has been only so understood. *2dly*, Publication is not charged in the libel; all that it alledges is, that one copy was printed by the pannel's order:

order: but printing one copy could never, in the eye of law, be publication; for the printing a single copy could never occasion disgust or discord between prince and people. The act 21. Rob. I. and the act 1662, distinguish between printing and publishing. What is printed must therefore be dispersed, in order to constitute publication; but that is not alledged in the libel; *l. 1. ff. De edendo; l. un. C. de famosis libellis; l. 5. § 11. ff. ibid.* All that is libelled is the giving orders to print; but that is not publishing: and as what was printed never was *de facto* published, there was at most no more than a *conatus*, which is not publishable; *l. 1. ff. Quod quisque juris; l. 10. par. 5.; l. 5. par. 10. De famosis libellis; l. 38. § 2. De pœnis.* So that the libel is not only founded upon old obsolete laws, but they are stretched beyond measure. 3dly, The pannel offers to prove, in exculpation, that his orders were limited not to print, without a licence from the provost of Edinburgh; which shows he had no design to raise sedition. 4thly, The pamphlet may be understood in a good sense, as containing a view of the tenets of those who, without any just reason, carp at the present administration, and a ridicule of such people. It is very common, in an ironical manner, to commend certain articles and principles which are meant to be exposed; and we have satires written against marriage, which were designed to recommend it. The proposition laid down in this pamphlet, That our prince is absolute, must be ironical; as it is plain from our history and acts of parliament, that he is not; and that the supreme legislative power is lodged in the King and parliament.

Answered. To the *first*, The three libels are all precisely in the same words, and are used for the purpose of giving citations on the discovery of more witnesses or new documents: but the conclusion is one. To the *second*, The pamphlet is referred to as a proof of the crime charged. To the *third*, The mere receiving a medal may not be criminal; but the pleading for receiving it in the manner libelled, shows a design to reflect on her Majesty's right, especially as it was objected to on account of its being a medal of the Pretender. The argument for receiving it on that account, and because he had the right

right of blood, which was good, was plainly to impugn her Majesty's right, as two rights to one crown are incompatible: and this was more than barely asserting the Pretender's relation to the Queen; for the pleading his right of blood, to reinforce the motto of the medal *Reddite*, was equal to pleading for the restoration of the Pretender. And as this was done publicly, it differs much from the keeping or using bad books, which may be connived at. And as to the keeping our money in France, it passes there as a coin in commerce.

As to the defences respecting the pamphlet, in the *first* place, writing is more than thinking. It is an overt act, and criminal of itself, by act 2. parl. 1662, and by act 10. parl. 10. James VI. *2dly*, The printing the pamphlet was the most direct method of publication that could be used. And as to the pretended caution, it might be affected; for if the pamphlet was in fact published, the author must answer for the consequences, especially as copies went abroad; which are presumed to have come, and must have come, from him or his associates. As to the meaning of the pamphlet, that is submitted: the perusal of it must satisfy every person, that it cannot bear the sham commentary now put upon it by the pannel's counsel. The laws libelled on are not obsolete, when a capital punishment is not insisted for; and they were mitigated by the act 1703.

The court found, " The pannel's pleading, at a meeting of
 " the faculty of advocates, to receive into the collection of medals in
 " the said faculty's library, the medal libelled upon, for this reason,
 " That the Pretender had the right of blood, and that the said
 " right was good, or words directly importing the same, and not
 " by inference, and that though the receiving of the said medal
 " had been objected against as injurious to the Queen her right to
 " the government, relevant to infer an arbitrary punishment. And,
 " *separatim*, found, His giving into the printer, and ordering him
 " to print the paper, intituled, *The Faculty of Advocates loyalty, in a*
 " *letter to the Queen's Most Excellent Majesty, by one of the Dean of Faculty's council*, libelled upon, and read in court, a sufficient publication

Nov. 1731.

The KING against CHRISTIE.

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" cation thereof, and relevant to infer an arbitrary punishment:
" and repelled the haill defences proponed for the pannel."
The diet was afterwards deserted.

Adv. Sir James Stewart, T. Kennedy,

Alt. Sir W. Pringle, Sir J. Naesmyth.

N^o 92.

November 1731.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

JAMES CHRISTIE gardener in Leith.

Murder.—Defence, That the person slain was put to death while in the act of adultery with the slayer's wife, found relevant to restrict the libel to an arbitrary punishment.—The jury acquit the prisoner.

HE was indicted at the instance of the Advocate for the wilful murder of Alexander Campbell, a foldier, on the 3d July 1731; in so far as " the said Alexander Campbell having been at the time within your dwelling-house, near to the Paunch-market, in the town of Leith, you, shaking off all fear of God, and regard to the laws, without any just provocation, wickedly and feloniously invaded the said Alexander Campbell with a drawn sword, or some other mortal weapon, and gave him several cruel wounds, whereof he instantly died: At least, at the place, on the day aforesaid, about five o'clock in the afternoon of that day, the said Alexander Campbell was barbarously murdered within your said dwelling-house; and his body was by you inhumanly dragged to the threshold of your house; and you had then, or immediately before, a drawn sword in your hand; and being then questioned about the murder, you did not dissemble it, but acknowledged, that you was the person who had killed the said Alexander Campbell. By all which you are guilty, actor, art and part, of the said horrid crime."

The pannel, denying the libel, pleaded, That supposing the fact

to have been as therein stated, the homicide was justifiable, the deceased having been slain while in the very act of adultery with the pannel's wife.

Argued in the information for the crown, "The procurator for the pannel, in support of his defence, cited two texts in the Civil law, viz. *l. Patri*, 20. ff. and *l. Marito*, 24. ff. *De adulterio*; whereby the father and the husband might lawfully kill the adulterer, *deprehensum in adulterio cum filia vel uxore*. And, 2^{do}, An argument in support of the defence was, by consequence, drawn from a person's lawfully killing a robber or a thief in the night-time: and it was contended, that in adultery, the husband was robbed of his honour, interest, peace, &c; and that those things being vastly of more value than money, or other moveables, the killing of a person for making an attack upon, or attempting to carry away, and destroy such valuable things, was much more justifiable than the killing of a robber or night-thief.

To which it was answered, *imo*, That as to the first of those texts in the Civil law, with relation to the father, it is founded upon a specialty amongst the Romans, to wit, the *patria potestas*; whereby the father had the *jus vitæ et necis*: and which, though once taken away, was only in a case of this kind so far revived; and therefore it is, that by their law, the lawfulness to kill, or the defence against murdering the adulterer, was only allowed, when both the criminals were at the same time killed, and that in the very act. But the *patria potestas* never having taken place in Scotland in the way it did by the Civil law, that text can never be made a rule with us.

In the next place, as to the *l. Marito*, and the argument from the parity of the case to a person's killing a robber, or night-thief; had we no positive statute or law, probably the court would follow the direction of the Civil law; but the act 22. parl. 1. Ch. II. sess. 1. being designed for removing of all question and doubt that might thereafter arise in criminal pursuits for slaughter, and that statute making no mention of a murder or slaughter of this kind, amongst those which are declared not to be punishable by death, and the law expressly

exprefsly fpecifying feveral other degrees of homicide, the confequence muft be, that the murder charged upon the pannel not being contained in the exception, nor mentioned in that act, it falls to be punifhed *via ordinaria*. Neither ought any regard to be had to parity of cafes, when our pofitive and ftatutory law is evident and clear. Befides that, confidering how very frequently men are poffeffed of groundlefs jealousies, if it were once underftood, that they could lawfully kill, and that a defence of this kind would be fuf- tained, it would be a great encouragement to the commiffion of the horrid crime of murder, when at the fame time the law has fuffi- ciently provided punifhments for adultery; and would make every private perfon judge of his own quarrel, and give him a power of taking revenge at his own hand.

In the next place, Albeit the Civil law could be made the rule in this country, yet it is evident the above texts, cited for the pannel, could not fupport his defence; becaufe the power was only given to the hufband to kill where the adulterer was a *vilis perfona*; and when the pannel's character is compared with that of the defunct, it can never be pretended, that the defunct, with regard to the pan- nel, was a mean perfon; and therefore, even by the Civil law, his defence could not be fufained relevant.

In the laft place, The pannel's procurator was pleafed to plead this as a total defence againft any manner of punifhment. But, with great fubmiffion, fuppofe the Civil law could be made the rule, yet, as Sir George Mackenzie obferves, that law ordained the hufband to be punifhed by fome arbitrary punifhment."

Argued in the information for the pannel, "Though we are com- manded by the law of nature to bridle our paffions, yet it is admit- ted, that there are certain provocations which flefh and blood can- not bear; and it will not be denied, that this is the very higheft in the clafs of provocation. The Romans, by whose law this defence was fufained, made the greatnefs of the provocation the foundation of their law in that particular; for it was permitted to the father to kill in all places, and in every cafe, both the adulterer and adulter-
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efs: but the liberty of killing by the husband was restricted to his own house, such adulterers as were *viles persone*; and even in that case, to the person of the adulterer only. For his wife he might not kill. And the reason of the law is exceedingly remarkable, not because the provocation of the husband was less than that of the father, but because it was greater; as it is laid down in a law of *Papinian*, l. 22. *Dig. Ad leg. Jul. de adult.* § 4. par. 4. “ Ideo autem patri, “ non marito, mulierem, et omnem adulterum, permissum est occidere, quod plerumque pietas paterni nominis consilium pro “ liberis capit; cæterum mariti calor et impetus facile decernentis “ fuit refrenandus.”

However your Lordships may think this reasoning too subtle as to the conclusion, (as it certainly is; for if the husband's provocation was greater, a greater latitude ought to have been given him to do himself justice): I say, though the reasoning may be too refined, yet this is evident from it, that the reason why it was permitted by the Roman law to the husband to kill at all, was because of the heinousness of his provocation.

But indeed it seems, that the foundation of this as a total defence, may be fought very justly elsewhere. As a man has a property in his own life and goods, so a woman has a property in her chastity, and a husband in the chastity of his wife. Indeed it is not every invasion of property that would justify homicide; but this must be estimated from the quality and degree of the transgression: and it is believed, it may be said with some reason, that where the invader was in a capital crime, there the defence of property, at the expence of the aggressor's life, is justifiable; and by the law of God this was a capital crime, Deut. xxii. 22.

However, not to establish this for an universal rule, it is consonant to the law of nature and nations, that a robber might be slain in defence of a man's goods, or a nightly thief, or a ravisher, by a woman in defence of her honour. These points are established law, and would operate an absolute acquittal to the pannel.

Nor is violence or resistance the sole foundation of this power given

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to the person invaded. That violence has no other effect in reason than what the nature of the thing gives it; and the nature of the thing gives the same effect to other hypotheses. What is the reason why a woman may, without fear of punishment, slay a man who attempts to ravish her? It cannot be solely the violence; because, if the case should be put of a woman surpris'd in a deep sleep, who, at waking, finds a man in the criminal act, and that instant kills him, no doubt she would, in the same manner, be affoiz'd: and the reason is, because, had she delayed execution but a moment, perhaps the wickedness would have been completed.

The very same is the case here: A husband has the very same interest in his wife's chastity, which a wife or a virgin has in her own; and he who invades that property, commits a robbery, not a metaphorical robbery only, such as that of his honour, the credit of his house, and the quiet of his life, (though these are all atrocious injuries), but a real substantial theft of the succession of his estate. An adulterer does, without suspicion, impose an heir upon his family, and by that means robs the person offended, to give an inheritance to a bastard of his own. In this light, it must be admitted, that the injury to the husband is greater than to a wife or virgin; because, let the act be never so forcible, there will still be a natural relation between the mother and child; but between a husband and a child so begotten there is none.

There then is the plain foundation of the law; not upon provocation merely, nor upon revenge, but because, had the thing been delayed a moment longer, the mischief had been past remedy: so that the husband really flew, because it was scarcely possible to preserve his property otherwise. And this seems to be the clearest foundation in the law of nature and reason for this power of the husband.

If a thief should have got possession of jewels to a great value, and the master finds him in the act, but is not able to catch him; and if the thief is so nimble, that unless some other way is found, he will certainly outrun the owner; who can doubt, that in such a case he might lawfully fire at the thief with a gun, though there is no resistance?

sistance? By the supposition, the parallel is exact, when it is thoroughly considered.

That in fact the law stood thus among the Romans, is evident from *l. 24. Dig. hoc. tit.* Nay the *l. 29. in pr. Cod. tit.* lays a punishment upon the husband as guilty of the *crimen lenocinii*, if, having found his wife in the act with an adulterer, he retained his wife, and let the adulterer escape. The husband himself was the sole witness to the fact, and by law an inhabile witness. The public revenge would have been disappointed, if the husband had failed that instant to exert the power which was in him, of killing the adulterer; which therefore is required of him as a duty under a penalty, as it is likewise required that he should put his wife immediately away.

The Roman law is no otherwise proposed to your Lordships, than as the example of a wise people, who apply to practice the principles of the law of nature and nations. It is true, that this general position was by them clogged with many exceptions; which at this day seem to be ill founded, but *non omnium quæ a majoribus nostris constituta sunt, rationem reddere possumus.* The reason for the distinction between the greater power of the father than that of the husband, in killing the adulterer; the reason of the restricting the husband's power to a *vilis persona*; of the obligation to put away the wife, under the pain of a *lenocinium*, though the husband was in his mind convinced of her innocence: I say, the reasons of these are lost by distance of time; and if known, perhaps would not suit the circumstances of the present age. Your Lordships may therefore take from the Roman law what is undoubtedly founded in the law of nature, viz. the rule itself; and neglect the exceptions, as not so well warranted from the reason of the thing.

But two things must be said here, in answer to what was urged on the other side: *1mo*, That the remains of the *patria potestas* could not be the sole ground among the Romans of this power; for this plain reason, Because the father had a power to kill the adulterer; which certainly had no connection with the *patria potestas*. And, *2do*, That the

the present case comes up to the requisites of the Roman law, That the adultery was committed in the husband's own house, and by a *vilis persona*; one who, from being a street-cadie, had lifted himself as a private centinel in a regiment of foot.

It is not material, that the defunct was not such a *vilis persona* as is enumerated in the law. The instances there given are only examples; it is not so much as mentioned, that an infamous person was *vilis persona*, which no doubt he is: the meaning of the law extended not only to persons of bad fame, but to all persons of low degree.

Nor is it to the purpose, that the defunct was in equal degree with the pannel; for there is no distinction in the law, providing the husband has the *jus accusandi*.

To the authority of the Civil law, the pannel adds that of the greatest number of the states in Germany, who, as Matthæus says, *ad hunc tit. cap. 7. num. 15.* still make this a total defence; and likewise that of Grotius, who maintains the same thing to be the law of the province of Holland. Matthæus is indeed of the contrary opinion; but the reason of it he principally draws from the statutes of his own province of Utrecht. However, it is hoped, with your Lordships, the authority of the great Grotius, in an undecided point, will have considerable weight. This treatise of his is in *lib. 3. Manuductionis ad jurisprudentiam Hollandiæ.*

The pannel is the less anxious of labouring that point, that this operates at least a mitigation of the punishment; because, by the Roman law, a father or husband, who should irregularly kill the wife or adulterer out of the precise circumstances of the law, were yet not liable to the ordinary pain of the *lex Cornelia de sicariis*. And Matthæus, and the other doctors who argue against Grotius, admit this as a good restrictive defence. Nay, it is but faintly denied by the pursuer; only it is contended, that the act 1661 enumerates all the kinds of homicide which with us are not capital. But besides that the act enumerates only a few sorts of justifiable homicide, omitting a great many more, such as the killing of a *fur nocturnus*, or
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of a *ravisher* of a woman, it was justly observed by your Lordships, that the act principally, if not only, concerned depredations by the highlanders and borderers.

It must indeed be acknowledged, that our learned Sir George Mackenzie, tit. Murder, § 14. gives his opinion differently from Grotius; and lays his reason partly upon the act 1661, and partly upon this, that deeds done in passion, through great provocation, are not thereby totally justified, but only alleviated. In answer to which, it may be observed, that Sir George seems to interpret the statute too generally; of which mention has been made already: And as for the reason of the thing, it stands not barely upon provocation, but upon a necessary assertion and vindication of a private right: however, that eminent lawyer only mentions it as his own opinion.

The pannel then leaves his defence with your Lordships. The words of the civil law are, *per l. 4. hoc tit. per legem Juliam IMPUNE occidi posse*. There is properly no question in the case but one, Whether the defence is relevant totally to *affoizlie*, or only to restrict? And it is hoped, that your Lordships authority in this decision, shall, in future times, be quoted to enforce that of the Civil law, of Germany, and of Grotius, upon the side, not only of irresistible, and therefore justifiable, nature, but also of material justice and immutable reason."

Nov. 12. 1731. The court found "the libel relevant to infer the pains of death: but, for restricting the murder libelled to an arbitrary punishment, sustained this defence relevant, That the pannel killed the defunct while he was in the act of adultery with the pannel's wife."

It appeared from the evidence, that the prisoner had given the deceased several wounds, of which he died: the defence was also proved. The prisoner's wife was adduced for him without any objection, and swore the deceased had carnal dealing with her when her husband came in: and this was corroborated by certain circumstances

March 1737.

The KING against MACLAUCHLAN.

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stances swore to by the surgeons adduced for the crown, who inspected the body of the deceased soon after his death.

The jury, Nov. 16. 1731, "all in one voice, found the libel not "proven." Upon which the prisoner was dismissed.—The jury should have found, *Not guilty*.

Att. Jo. Forbes.

Alt. Hugh Dalrymple.

N^o 93.

March 1737.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

WILLIAM MACLAUCHLAN.

Trial for being one of the Porteous mob.

THE indictment was as follows. "That whereas by the law of God, the Common law, the Municipal laws and practice of this kingdom, and the laws of all other well-governed realms, privy conspiracies, to raise, procure, and move, and the raising, procuring, or moving, seditious commotions of the people, mobs, or tumults, in violation of the laws, repose, and tranquillity of the kingdom, or any part thereof; the convocating the lieges by beat of drum, and their assembling themselves riotously and tumultuously together, armed with guns, lochaber-axes, or other warlike weapons whatsoever, within borough, without the special licence of the sovereign, or the magistrates of the same; the surprising, invading, or seizing, the guard-room of any borough or city by force or violence, disarming and driving out the soldiers placed there for the preservation of the public peace, and the taking away their arms; the violent and masterful seizing and securing the gates of any city or borough, by numbers of dissolute and disorderly persons riotously assembled, whereby the lives and properties of the inhabitants are put under the power, and exposed to the rage and caprice, of the

giddy and profligate part of the people; the insulting, stoning, and resisting, magistrates in the due execution of their offices; the raising wilful fire, and forcibly breaking open the doors of public prisons, and by force, threats, or terrors, extorting the keys from the lawful keepers, and setting at large prisoners lawfully confined for capital or other heinous crimes; and the committing wilful and deliberate murder, under cloud of night, in derision of public justice, in open defiance and contempt of his Majesty's laws and authority, and attended with circumstances of brutal cruelty; are most enormous and detestable crimes, destructive of the public peace, dangerous to the lives, liberties, and property of the subject, subversive of all laws, government, and society, odious and abominable in the sight of God and man, and most severely punishable: Yet true it is and of verity, That you have presumed to commit, and are guilty of all or one or other of the foresaid abominable crimes, aggravated as aforesaid; in so far as, upon the 7th day of September, in the year of our Lord 1736, or one or other of the days of the said month, certain seditious and blood-thirsty persons, shaking off all fear of God, regard and reverence to his Majesty's laws and authority, guided by disloyal and diabolical principles, or instigated by dangerous and desperate incendiaries, having feloniously conspired unlawfully to raise, move, and procure, mobs and tumults, insult the laws and public authority, and, in an outrageous manner, to break and disturb the public peace in the city of Edinburgh, to do murder, and commit the other black and odious crimes after mentioned, did assemble themselves together within the said city and county of Edinburgh, about the hour of nine, or some other hour that night; and being armed with clubs and other offensive weapons, seized a drum in the possession of the drummer of Portsburgh, part of the suburbs of Edinburgh, and by beating the same within the said borough, convocated and brought together great numbers of dissolute, profligate, and disorderly persons, who proceeding to the Netherbow-port of the said city, by force and violence seized upon the keeper and keys thereof, shut and locked the gate, and marching to the guard-

guard-room, where the city-guard, constituted by act of parliament, was in use to be kept, by force and violence seized the centinel standing at the door, entered the same, and disarmed and drove out the foldiers placed there, by the authority of the magistrates, for the preservation of the public peace, and arming themselves with the guns, halberts, lochaber-axes, and other weapons, kept in the said room for the defence of the city, sent parties to the several ports, and took possession of the same, shutting the gates, nailing or rolling stones to secure the said gates: And having thus made themselves masters of the city, to the great fear, terror, and trouble, of his Majesty's lieges, to the imminent danger of shedding much blood, pillaging, plundering, and burning, the houses of the inhabitants, they advanced towards the public prison of the said city, and planted some of their accomplices, armed as a guard, from the north side of the said prison, commonly called *the Purses*, across the high-street, to stop all who did not unlawfully associate themselves with them, from passing to the prison-gate, and with fore-hammers beat on the door of the said prison, in order to break it open; and among the rioters so planted as a guard, and at the prison-door, and in divers other places, during the said tumult and sedition, you the said William Maclauchlan, armed with a lochaber-axe, or other offensive weapon, was unlawfully and riotously assembled with them: And when the magistrates of the city, as in duty bound, went in a body toward the said prison, to disperse the riotous and unlawful assembly, showers of large stones were by you, or your accomplices, poured upon them; whereby some of them were bruised, and all of them, under great terror, were obliged to fly, and save themselves from the fury of an armed mob: And further, you, or your accomplices, by burning torches, links, whins, or other combustible matter, wilfully and maliciously set fire to the said prison-door, to the great danger of the adjacent wooden houses, and other houses and shops; and having burnt and beat the same open, seized the keeper; and by force and fear extorted the keys of the rooms of the said prison from him, and dismissed William Grinfell, imprisoned there for

murder, James Ratchiff, imprisoned for theft, robbery, and house-breaking, and divers other persons there, also committed by lawful warrants: And you, the said William Maclauchlan, having conceived a deadly hatred and malice against John Porteous, commonly called *Captain Porteous*, there also confined under sentence of death, the execution whereof, by the amiable power and prerogative of the crown to show mercy to subjects condemned, had been respited by her sacred Majesty the Queen, then guardian of the kingdom, you, or your said accomplices, laid violent hands upon him, with intent to murder and bereave him of his life; and having dragged him by the heels down the said tolbooth-stair, crying for mercy for Christ's sake, lengthening out your cruelty towards him, alternately led, dragged, and carried him, fainting and falling on the street, to the Grass-market, within the said city of Edinburgh, the place of common execution, in derision of public justice; and making a stand at the gallows-stone, where the gibbet is usually placed, you consulted together in what manner to put him to death; and about the hour of eleven, or some other hour that night, having hurried him to a dyer's tree near the said place, while in most moving manner he was supplicating for a little time to recollect himself, as a dying man, and to beg mercy from God, you, or your wicked accomplices, renouncing all Christian compassion, and even human nature, fixing a rope about his neck, instantly drew him up upon the said tree; and when he endeavoured to save himself, by catching hold of the rope with his hands, you, or one or other of your vile associates, barbarously beat them down with a paddle, or other instrument, and brutally struck him upon the face with a lochaber-axe, or other weapon; and wantoning in your wickedness, making loose the rope that was fixed about the said dyer's tree, you, or some of your accomplices, let him down to the ground, and pulled him up again, where he hung by the neck till he was dead. All which detestable facts and crimes were impudently, wickedly, and maliciously done, and committed, by the said dissolute and disorderly persons, riotously and tumultuously assembled, in manner above described; and the said

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John Porteous was cruelly murdered, at the time and place aforesaid, in a daring and outrageous manner, to the dishonour of God, the contempt of his Majesty's laws and authority, and to the lasting infamy of the barbarous and bloody actors; and you were art and part of all, or one or other, of the foresaid crimes, aggravated as aforesaid. Which facts, or part thereof, or your being art and part in all or any of the foresaid crimes, being found proven by the verdict of an assize, before the Lords Justice General, Justice-Clerk, and Commissioners of Justiciary, you ought to be most exemplarily punished with the pains of law, to the terror of others to commit the like in time coming."

The court assigned the prisoner counsel. He pleaded, Not guilty; and, in point of fact, it was set forth for him, That "he was footman to my Lady Wemyss at the time, and was sent by her Ladyship the forenoon of that day, the 7th of September, to Craigiehall and Gogar on an errand, and got drunk to such a degree, that when he returned he was not capable to deliver the letter he had received, but which behoved to be done by another.

The pannel, soon after his return from Craigiehall, went from my Lady Wemyss's house to John Lamb's, an ale-house in the same stair, half an hour after nine. When he entered Lamb's house he staggered with drunkenness, and was detained there till within a quarter of eleven, and then went out, in order to go to his own house in the Canongate. That, in passing, he called at Mr Cassie's vintner, and drank a chopin of ale or two with the servant there; and betwixt Lamb's and Cassie's fell once or twice.

That, strolling in his drunkenness through the street, he met with two bakers, who carried him away with them to the mob; and whether they put a lochaber-axe in his hand, or not, he does not remember; but, from the computing the time, the mob had proceeded so far that Mr Porteous was in their hands on the street before he mingled with the rioters; that he had no active part in what remained, nor indeed was capable, being overpowered with liquor.

That all this while the pannel was in his ordinary livery-habit,
and

and went home to his bed, and did not attempt to fly or abscond next day, or at any time thereafter."

In point of law it was pleaded for him, That the facts libelled, viz. the breaking prison by an armed multitude, setting felons at liberty, and the putting to death a man who had been reprieved by the Sovereign, amounted to high treason, and could only be tried as such, according to the mode prescribed by 7^o Ann.; Case of Peter Messinger, State trials, vol. 2. p. 51.; Case of Daniel Dammarie, ibid. vol. 8.

Ans. 1. The same *species facti* may be the foundation of different actions; and the prosecutor may insist upon what statute or ground in law he chuses. If a traitor in rebellion kill one of his Majesty's subjects, the act is treason, and may be prosecuted as such; but at the same time it is felony, and may be tried accordingly. Civilians treat of this question. "Si delictum aliquod reperiatur punitum pluribus legibus, an debeat reus delinquens ex una, vel ex omnibus, vel ex aliqua accusari et condemnari?" *Gomez. resol. jur. civ. tom. 3. c. 1. n. 38.*; and certain rules are established for determining when one trial does, or does not, exclude a second upon a different ground in law. But it was never doubted, that the prosecutor has it in his power to insist against an offender, for any crime he has committed, though the *species facti* afforded a ground for a prosecution of a different nature.

2. The court would have been competent, though the prosecution had been for high treason; because though by 7^o Ann. her Majesty, her heirs, and successors, are impowered to issue commissions of oyer and terminer in Scotland; yet it is provided, "That the justice court, and other courts having power to judge of high treason and misprison of treason in Scotland, shall have full power and authority, and are thereby required, to inquire of all high treasons and misprison of high treason; and thereupon to proceed, hear, and determine, the said offences, whereof any persons shall be indicted before them."—Hence, had this been a trial for treason,

treason, the court would have been competent, though another method of proceeding would have been requisite.

3. The indictment, as framed, does not amount to high treason. The chief aim of the conspirators and their associates was to murder Captain Porteous. For this purpose, they armed, broke the prison, and committed the other offences set forth in the minor proposition; therefore the convocation being on a private and particular design, it was not levying war against the King. In the case of Messinger and others, it was agreed by all the judges, that if their intention was to pull down two or three particular bawdy-houses, it was not high treason; Hale, Reyling. In Dammarie's case, the chief article found to be treason was, the levying war to pull down meeting-houses in general, not one or two particular meeting-houses.

Replied. By the laws relative to high treason, if it be not tried within a certain time the guilt is abolished; but according to the prosecutor's argument, after the crime has been abolished as to the highest effect, it may be still prosecuted under another denomination; and though a man has been absolved upon an indictment for treason, he may be still tried for a lesser offence; or, if he has been absolved on an indictment laid for a lesser offence, he may afterwards, on the same *species facti*, be indicted for treason. All which is absurd; and was not allowable in this country, even before the English laws as to high treason were extended to Scotland; *e. g.* theft in landed men before that time was high treason in this country; and therefore it could not be prosecuted before an inferior court, nor could the prosecutor restrict his libel; Mack. tit. Theft, § 22.

Upon supposition the trial could proceed on this indictment, it was pleaded for the pannel, That the libel does not charge him with having been in the conspiracy; according to it, the rioters had not only formed their plot, but in a great measure executed it, before he came among them; and as it is not said he was one of the contrivers of the mischievous design, he is only answerable for what part he acted himself, not for the deeds of others; consequently all the alternatives in the

the libel must go for nothing. All lawyers are agreed, that bare presence in a mob or tumult is not criminal. People very often mix with the mob from curiosity, or an intention to quell the disturbance; therefore bare accidental presence cannot fix guilt on a man, though he was armed, unless he was aiding and assisting; which is not libelled in this case. *Clarus, lib. 5. § Homicidium, n. 37.; Menach. De arb. jud. cas. 362.; Matthæus, tit. 5. c. 3. § ult.; Mackenzie, tit. Murder, § 12.*

In the trials for the mob at Edinburgh in 1700, and that at Glasgow in 1725, the court did not find simple presence, though with arms, relevant, but only *aiding and abetting*. This is likewise the doctrine of the law of England; Case of Messinger and others, State-trials, vol. 2. p. 31.; and this holds even in treason.—The libel, therefore, against the pannel is not relevant; as it does not charge aiding and abetting, but only, that he was unlawfully assembled with the rioters.

Ans. The rising of commons, hindering the Common law, or being found in manrent, or in fear of weir with any man, but with the King or his officers, within borough, are discharged under this penalty, That the lives of the offenders shall be in the King's will, and their moveables escheated; act 77. parl. 14. Ja. II.; act 83. same parliament; act 17. parl. 18. Ja. VI. These statutes are not in desuetude: Many trials have proceeded upon them; Case of Strachan, 26th November 1664; Chinzie 1662; Mowbray, 8th February 1686; and Keith in the same month. These laws are reasonable: when there is a commotion within borough of persons unarmed, many are led to join them by curiosity; and it would be hard, that *nuda assistentia*, or bare presence, should infer a severe punishment: but when a commotion of the people within borough, where a multitude is soon and easily assembled, proceeds so far as that they arm themselves, the community is endangered, and such rioters may justly be punished with death. So stands the law in other countries, *l. 38. ff. De penis; l. 1. ff. Ad leg.; Jul. Majest.; Sande, lib. 5. tit. 9. def. 12.* takes notice of a commotion and out-
rage

rage not unlike that in question, which happened in Friesland; and he says, the seditious persons were put to death. In the case of Weir in 1700, the fray in which he joined was raised suddenly, without any previous conspiracy. In the case 1725, it was not libelled, that they were in arms. In this case there was a conspiracy, the aim of which was to murder Captain Porteous; and this was known from the beginning of the tumult. The assembling riotously and tumultuously in arms within borough, was criminal, and contrary to law; but the joining such assembly, their intention being known, was criminal in the highest degree. Therefore, as the intention of this mob was to murder, and murder was actually committed by them, there is no reason why the law should not be put in execution against the persons assembling in arms within borough without a licence from the King or the magistrates. The reason is plain: If a number of persons make a fray for an unlawful end, the deed of one becomes the deed of the whole; because they are *versantes in re illicita*; Hale, c. 34. p. 445.; Case of Lord Daire, there stated. And in burglary, standing as a guard, though at a distance, will make the person who watches aiding and assisting to the burglary. Since, then, the libel charges, That the pannel, armed with a lochaber-axe, was among the rioters, and stationed as a guard when his associates were breaking open the prison-door; and as they did actually burn and break it open, and murder Captain Porteous; this is relevant *per se* to infer the pains of death.

Replied, The old statutes are only levelled against *confederacies*; as is plain from the title of the first; which bears, "That no leagues or bands be made within borough, or manrent." In arbitrary times they have been extended to common tumults within borough, but unjustly; and they have been laid aside since the Revolution. Besides, they are virtually repealed by 1^o Geo. I. c. 4. commonly called *the mob-act*; which must be the rule as to all riots, whether within borough or elsewhere. It does not distinguish between presence with arms, and presence without them; and it is plain, no man can be subjected to a capital punishment, unless precisely with-

in the statute; which is an additional reason why one present with a mob can only be liable for his own actions.

The passage from Hale is misapplied. In all the English cases, nothing was sustained against the prisoners but acts of violence done by themselves. When a mob assembles with design to commit a particular crime, all against whom an act of force is found by the jury, are liable to the punishment of that crime, though they did not themselves perpetrate it: but when a mob accidentally gathers, without a previous intention, to commit a particular offence; those present, though they have been active, are punished only according to the degree of their criminal activity. But in both cases, unless acts of force are found against the persons accused, they can only be punished arbitrarily for being in an unlawful assembly. Hale, in the place quoted, is talking of the case in which all conspired to do an unlawful act; but in the very next page he refers to the case of Salisbury, and says, different persons may be guilty, some of homicide, some of murder. It is plain this pannel was not in the conspiracy: for if he had, he would have disguised himself, and not gone in his livery-coat; nor would he have returned home, but absconded.

It was next objected for the pannel, That the libel was improperly laid, because it did not name his accomplices; Mack. tit. Art and part.

Ans. This neither is, nor can be, required by the law of this or any other country in the world. All that Mackenzie says, which is founded on act 76. parl. 6. Ja. VI. is, that an indictment, or summons, charging accomplices in general to appear, cannot be the foundation for trying any person not named, as if the indictment in this case had not been against William Maclauchlan, but against the accomplices in the murder of Captain Porteous.

Replied. Mackenzie would not put a case that could admit of no doubt. If a man is indicted, he certainly must be named. His meaning therefore must be, that when a person is brought to trial for deeds done by others, those persons must be named, and proof brought,

brought, that they were his accomplices, by entering into a concert with him : and if this be not done, the pannel cannot bring proof to exculpate himself.

In case the libel be found relevant, the pannel offered two defences; — *first*, *Alibi*.

Ans. By the law of Scotland, and that of other countries, (*Bald. in l. fin. C. de prob.*), defences contrary to the libel are inadmissible, it being a maxim, “*Quando delictum est plene probatum per testes affirmantes, non est admittenda contraria probatio per testes negantes.*” However, the defence of *alibi* is so favourable that it has been admitted; but then it must be so qualified, as to render it impossible that the pannel could be guilty of the crime libelled; *Mack. tit. Exculp. § 22.* In this case it is not, and cannot, be pleaded, to exculpate from accession to all the criminal acts, but only some of the first. Besides, it is hardly possible the pannel can prove *alibi* sufficiently in this case: Lamb’s house is but 150 yards from the prison-door and the Purses, where it is libelled he was placed as a guard.

Replied. The import of the defence is, That he was none of the original promoters of the mob, nor with them from the beginning : and it is a rule, That even in a rebellious insurrection, those who are not found to have been with the assembly from the beginning, but only to have suddenly joined them, are guilty of no greater offence than a riot, if they have done no acts of violence; *Hawkins, c. 17. § 26.* The notion, that no defence is admissible which is contrary to the libel, was long ago exploded; and “it were contrary to the rules of law and humanity, to give the *prerogative of probation* to the pursuer against a poor pannel swimming for his life;” the libel does not specify the precise time the pannel stood at the *Purses*.

Second defence, The pannel was mortally drunk at the time libelled.

Ans. In civil questions, as to contracts and deeds, drunkenness may be taken into consideration; not in crimes. Were it otherwise, full scope would be given to commit crimes: but, by law, those who

presume to commit capital crimes when drunk, must submit to capital punishments when sober. Some lawyers hold drunkenness to be an aggravation: *Peccat dupliciter*, *Gail. obs. lib. 2. obs. 110. § 25.* And all agree, that "levis et modica ebrietas nec excusat nec minuit delictum." The pannel could not have acted the part he did had he been overpowered with liquor. *Hale, c. 4.* is clear against this defence. Mackenzie says, he never found it sustained; and that in a case of murder it was repelled; Spott against Douglas, 1667.

Replied, That drunkenness exempts from the ordinary punishment, is expressly laid down in *l. 11. § 2. ff. De penis; l. 6. § 7. ff. De re milit.* Mackenzie gives it as his opinion, that on account of it, in circumstantial cases, the privy council should mitigate the punishment. And as we have no privy council now, the court ought to take it into consideration; though, while the privy council subsisted, they never sustained it, even to the effect of mitigating the punishment. In England it is allowed to be proved, and goes to the jury with the other circumstances, as in Dammarie's case, who pleaded, too, that he was accidentally present when he fell in with the mob.

March 19, 1737. The court found, "That, time and place libelled, a number of people having unlawfully, riotously, and tumultuously, assembled, armed with clubs, and other warlike or offensive weapons, to which unlawful convocation the pannel William Maclauchlan, armed with a lochaber-axe, or other offensive weapon, joined himself; or that the said pannel was aiding or assisting in all or any of the facts libelled: or his being art and part thereof, relevant to infer the pains of law; but allowed the pannel to adduce what evidence he could with respect to his behaviour at the time the foresaid crimes were libelled to have been committed, for taking off the circumstances which should be brought for inferring his being guilty, or art and part, of the crimes libelled: and repelled the hail other defences," &c.

The

March 1738. HAGGART against his MAJESTY'S ADVOCATE. 645

The jury found him not guilty: upon which he was dismissed from the bar.

Att. Ch. Areskine.

Att. And. Macdowal, J. Campbell.

In 1738, Thomas Linning also was tried for the same offence, and found not guilty by the jury.

N^o 94.

1738.

DAVID HAGGART of Cairnmuir,

AGAINST

HIS MAJESTY'S ADVOCATE.

Complaint against the Advocate for conducting a prosecution oppressively.

IN March 1738, an information, or presentment, was taken, made up, and signed, by the sheriff-substitute of Perthshire, against David Haggart of Cairnmuir, charging him as being guilty, or art and part, of the wilful burning the manse of Caputh, upon or about the 8th April 1736; and containing the names and designations of twenty-five witnesses to be adduced for proving the crime.

This information having been transmitted to the advocate-depute, he caused an indictment to be raised and executed against Mr Haggart, in order to his being tried for the crime at the ensuing circuit at Perth.

When the trial came on at Perth, the advocate-depute set forth, That the pannel had been very industrious in procuring evidence to disqualify and discredit Thomas Souter, one of the principal witnesses for the crown; and that therefore it was not thought expedient to proceed to the trial till an inquiry had been made into the facts on which it was understood the objections to that witness were to be founded: the advocate-depute, therefore, moved, that the trial

should

should be remitted to the justiciary at Edinburgh, and the pannel transported thither.

Upon this motion there was a debate; and the judge at the circuit remitted the indictment to be tried before the justiciary at Edinburgh, continued the diet till the second Monday of June then next, and ordered the pannel to be transmitted to Edinburgh.

On the 2d of June, a petition was preferred for the prisoner, complaining of this remit, which he alledged was unprecedented, and could not be the foundation of a trial before the justiciary; so that the continuation was equivalent to deserting the diet: and therefore he prayed the court, in terms of the act 1701, to issue letters or precepts, to charge the magistrates of Edinburgh, and the keepers of their prison, to set him at liberty. Upon reading this petition, the advocate-depute objected, That the prayer of this petition was not founded on the statute, as the time prescribed by law for insisting in, and concluding the process against him, was not elapsed; and thereupon the court refused the petition.

The trial came on before the justiciary on the 12th June, to which it had been continued. The advocate-depute not being yet prepared, deserted the diet. Upon which the prisoner was dismissed.

Upon this Mr Haggart preferred a petition to the court, June 21. signed by four lawyers, complaining of the procedure against him, and praying the court to "order his Majesty's Advocate, either to show cause for this prosecution, or discover his informer; and particularly to ordain his Majesty's Advocate to show cause why the diet at Perth was continued to Edinburgh; and in case no sufficient cause is shown, to find his Majesty's Advocate liable in the sum of L. 500 Sterling of damages to the petitioner; and to give such other redress to the petitioner as to their Lordships should seem meet."

June 22. The court ordained this petition to be seen and answered by his Majesty's Advocate, and his deputies, as well at the last northern circuit as at Edinburgh. Answers were put in accordingly.

In support of the petition, it was argued, "That though there

lies a strong presumption, that his Majesty's Advocate will not prosecute calumniously, or carry on an oppressive prosecution against any of the subjects; that yet, if a case should occur, where a person of substance, of entire character and credit, is arraigned of the most horrid, barbarous, and atrocious crimes; is clapped up in prison for them, and thereby long deprived of his liberty; is staged at circuit-courts, and brought to a pannel, charged with such crimes; is removed from prison to prison, and from bar to bar, set up as an infamous spectacle to crouds and multitudes, who generally look on at such occasions; and that all this should be done against the most innocent of the subjects; and then the prosecution entirely dropped, and deserted, without the least cause shown for all this harassment: it is impossible to conceive, that the law of any country can be so rude and barbarous, as not to afford a remedy to a person so oppressed.

And therefore it is, that by the law of all nations, the fisk, or public prosecutor, though he is not presumed to be calumnious, yet if he shall be found to have prosecuted affectedly, and without any just cause, he is not only liable in damages, but may be otherwise punished.

And your petitioner does humbly apprehend, that the law of Scotland has no wise left the subjects without a remedy in such case: for by the act 1701, made anent wrongous imprisonment, it is provided, "That no person shall be so much as imprisoned as guilty of any crime, without a signed information against him." And there can be no doubt, if such information is calumnious, that the informer is liable in damages, and even obnoxious to punishment, according to the degree of the offence.

And if the law has taken such care of the rights of the subjects, so as to afford them a remedy against persons who shall wrongously bring them under restraint, as a step to their trial; how much rather must there a remedy lie for persons who are groundlessly, not only deprived of their liberty, but laid under trial, and ignominiously defamed and exposed, as your petitioner has been.

Your

Your petitioner does humbly apprehend, that where his Majesty's Advocate is sole pursuer, especially against a person of credit and character, he cannot be answerable for the pursuit, but upon such inquisition taken, as can give reasonable evidence that there was sufficient ground for such prosecution; and if he does otherwise, he does it upon his peril, and must be liable to the party accused for the consequences.

That if his Majesty's Advocate thinks fit to proceed otherwise, and without any inquisition taken by himself, or on his behalf, your petitioner does, with great submission, apprehend, that he cannot warrantably prosecute without the voluntary information of some credible person or persons; in which case, such information may be sufficient excuse for his Majesty's Advocate; but then the informer must answer for the consequences: And Sir George Mackenzie, in his title of *Accusation and Accusers*, part 2. tit. 19. says, "That in our practice, the Advocate doth ordinarily ordain the informer to find caution." And in that same title, towards the end of it, he mentions, "That if the accuser be found to be calumnious, or malicious, it is arbitrary to the justices to inflict what punishment they please;" and founds his opinion upon two acts of parliament, and particularly upon the 78th act, parl. 6. James VI. which decrees the accuser to pay certain sums to the party acquitted of the accusation; and then it is statuted in the said act, "That gif the King's Majesty's Advocate be only pursuer, his informer is to pay the fine afore said." From whence it is obvious, that in the case of an unjust or malicious pursuit, that either his Majesty's Advocate, or his informer, must answer for the consequences of such pursuit, and the damages from thence arising, to the party; that is, the informer must be liable, where any such there is; and if the trial has proceeded without any such voluntary information, his Majesty's Advocate must be liable, unless he can shew sufficient cause, upon inquisition taken by himself.

That it is no sufficient excuse against a groundless prosecution, that a presentment was offered from a proper officer of the law for
having

having a person put in the Porteous-roll to be tried at a circuit-court; because, your petitioner humbly apprehends, that upon such presentment, his Majesty's Advocate cannot warrantably indict, but upon a precognition transmitted to him, from whence he may form a judgement of the grounds of indicting, and also of the way and manner of his laying his indictment; and that if his Majesty's Advocate does, upon a bare presentment, carry on a prosecution, he does it at his peril: and it will be found to be the ordinary practice, that his Majesty's Advocate never does indict upon such bare presentment, nor otherwise than when a precognition is transmitted; and that even if such precognition does not contain a probable ground of guilt, his Majesty's Advocate does still refuse to indict. Neither indeed in reason ought it to be otherwise, or that his Majesty's Advocate should indict without sufficient cause shewn to himself; for if such method should not be followed, it would expose the subjects to the greatest hardships.

That your petitioner does humbly conceive, that he has suffered very uncommon hardships during the course of his prosecution; a thing that ought to be accounted for by the prosecutors, and, with humble submission, requires your Lordships strictest inquiry; to wit, That being indicted, and a diet fixed for his trial at the last circuit-court at Perth, your petitioner had brought over counsel to assist him, and taken out letters of exculpation, had brought up four score witnesses to vindicate his innocence at an exceeding great charge; and being prepared for trial, hoping to recover his reputation, as well as his liberty; that yet, notwithstanding, his Majesty's Advocate would neither go on to trial, nor yet desert the diet, but prayed the court to remit your petitioner to be tried at the justiciary-court at Edinburgh, pretending he would be ready to proceed there: And as the court could not know but that there might be special reasons for so doing, it was accordingly granted, and your petitioner exposed to further infamy and expence, by being carried from sheriff to sheriff, and lodged in the prison at Edinburgh.

That so soon as your petitioner had access, he applied to your

Lordships at Edinburgh, setting forth these several hardships; and, amongst others, that he was unduly kept under confinement, in respect that he had run letters of intimation, and that he had not been brought upon trial within sixty days after duly intimating such his letters, as the act 1701, anent wrongous imprisonment, plainly directs; and that the prosecutors did not appear in earnest for his trial at the second diet: and therefore praying to be set at liberty.

That his Majesty's Advocate opposed this petition, as being prematurely brought, and not competent to be insisted on, until the second Monday of this present month, the diet of trial appointed by the remit at the circuit-court of Perth; whereby your petitioner's confinement was lengthened to the last moment.

That when the said second diet of trial came on, there was not so much as a jury brought for trying your petitioner, or one witness adduced against him; but his Majesty's Advocate, without the least cause shewn why the diet was not deserted at Perth, did then, before your Lordships, desert the diet.

That your petitioner does, with great submission, take this last step to be an intolerable grievance, altogether unprecedented upon the part of his Majesty's Advocate, as well as obviously vexatious: for why ought not the diet to have been deserted at Perth, when, from what is above noticed, there neither was, nor could be, the least intention to try at Edinburgh, seeing no jury nor witness was brought to attend at that trial?

That upon the whole matter, your petitioner does humbly conceive, that he has all along suffered the most uncommon hardships, such as, if countenanced, are subversive of the rights and liberties of the subject. Your petitioner is a landed man, of unblemished character, never hitherto called in question; has now for many months stood arraigned of the most horrid and atrocious crime of wilful fire-raising, of the most aggravated nature, more than two years after the crime is said to have been committed, and has thereby been exposed to infamy and reproach; has been deprived of his liberty, remitted from court to court, his trial industriously delayed by

by his Majesty's Advocate, in direct contradiction, as he conceives, to the act 1701, for preventing undue delays in trials: That the diets of trial, which ought to be the most peremptory, have been continued upon him, which has added both to his infamy and expence; and every part of this hardship suffered without the least cause shewn by his Majesty's Advocate."

In the answers, it was argued, "That the Advocate's informer was the sheriff at Perth, a magistrate intrusted by the law; and the information itself is extant, and recorded in this court, in a book kept for that purpose. The advocate-depute, therefore, did no more than his duty, when he caused an indictment to be raised against the petitioner; and he would have been to blame had he not done so.

There is no law that requires a precognition to be transmitted along with the presentments, though it is *de facto* often done; and it is useful or convenient that it be done, in order the better to draw the indictment. And in the record that is kept of all these informations or presentments, the informations themselves are inserted, together with the list of witnesses sent along with them, but never any precognition that may have been taken of these witnesses.

2dly, If a precognition were necessary to be transmitted, where is the law that intitles the Advocate to advise or judge of that precognition? The statute of the 8th of Queen Anne, nor any other law that the respondents know, gives him any such power, but singly directs the informations to be put into his hand, "That libels and "indictments may be raised." And so far as the respondents can discover, from looking into the record of these informations for a good many years past, there is not one to be found that was refused, either by reason that there was *no precognition* accompanying it, or that, from the precognition, there did not appear a *probable ground* of guilt or conviction.

When the Advocate prosecutes of his own accord, he ought not only to maintain the relevancy of his libel, but if, upon trial, it shall appear destitute of any probable evidence, he may perhaps be obli-

ged to discover his informer, or shew cause for the prosecution, that the subjects may not be vexed without remedy: but in respect of trials at the circuits, the law has intrusted the inferior magistrates with taking or transmitting of informations, in order to making up of dittays concerning crimes; and as to these, the Advocate has no concern with the proof, farther than to see that there are witnesses found, by whom the inferior judges, making such presentments, do expect the crime may be proved.

If the petitioner's doctrine were true, That a *precognition* was *essential* to an indictment for the circuits, and the Advocate *answerable* to the party, that such precognition contained a *probable ground of guilt*, it would infer a task upon his Majesty's Advocate, *dangerous* to the public, or to himself. If he refuses to indict, he is exposed to outcry and complaint, for *screening* offenders, and hindering the course of justice; and if he shall indict upon evidence, suppose, that appeared to him probable, he is exposed to such demands as those of this petitioner, for very heavy damages, and himself to stand trial before the court, whether the precognition was such as gave a sufficient or probable cause for prosecuting.

It is difficult for any man to judge what will either satisfy a jury to convict, or even satisfy the judges that there was probable cause for the trial; and besides, there is no concluding with certainty, from the declarations of witnesses not upon oath, but that they may say *more*, as well as *less*, when they are upon oath.

And with respect to the public interest, it is evident, that this would put it in the power of his Majesty's Advocate, if at any time the person bearing that office should be so disposed, to screen the offenders who should be presented by the proper magistrates, whom the law intrusts with that part of the office of a grand jury; but the respondents cannot find, that the law has impowered the Advocate to be a *superior check* or controul upon these magistrates, and to *stifle* or *suppress* such of their informations as he thinks fit.

On the contrary, by the practice of this court, he is obliged to *shew cause* whenever he *refuses* any of them, and to write down and subscribe

subscribe his reason; and as the *refusal* is his *proper act*, he ought to be tender and cautious in the exercise of it; and, *in dubio*, should rather give way to, than *reject*, the informations that come to him from the proper officers.

The refusals of such informations have been usually upon such reasons as these following: When, by the date of the fact charged, it appeared to have been committed prior to the last indemnity, and plainly to fall under it: When the information is so confused and perplexed, as renders it impossible to be understood, so as to form an indictment out of it: When it is not duly signed by the inferior judge and clerk, as the law directs: When it does not appear to contain any colour of a relevant point of dittay. These are the precedents which the respondents find in the records to explain from practice the nature of such cases, where the Advocate has been used to reject informations; which are widely different from what this petitioner pretends, and whereof no one example can be found of a refusal for want of a precognition, containing a probable appearance of guilt.

But, in the next place, to give your Lordships the more ample satisfaction, that this complaint is groundless and vexatious; supposing all that is alledged in the objection were true, or that the petitioner's doctrine, concerning the Advocate's *power* and *duty*, were to be held as *just*; yet his complaint would be equally groundless: for so it happened in this case, that there was a precognition sent along with the information against him, containing the examination of two thirds of the witnesses in the list transmitted; and that precognition did appear to the Advocate-depute to contain a probable ground of guilt, besides what might have come out from eight more witnesses in the list, who had not been precognosced, and yet might, doubtless, be competently examined upon the trial: for the respondents never heard this reckoned amongst the legal objections for setting aside a witness, that he had not been *precognosced*.

The respondents cannot be obliged here to verify this last answer to your Lordships, or to discover to the petitioner the amount of the
King's

King's evidence; because the petitioner is yet obnoxious to be brought to trial by that very act 1701, which is often mentioned and misapplied in this complaint. And this, by the way, affords an additional confutation of the petitioner's doctrine: for if it were competent for any party, who had been once impanelled, and the diet against him deserted, to call upon the Advocate to *show cause* for the *prosecution*, by producing a *probable precognition*, when, at the same time, it was competent for the Advocate still to bring him to trial, this might, in many cases, plainly disappoint such trial and conviction, even of persons truly guilty, by furnishing them with a particular account of what each of the King's witnesses could swear against them; and it is obvious what use might be made of such notice by an *industrious criminal*, either by tampering with these witnesses themselves, or with other witnesses, in order to obviate or disprove their testimonies, or to prove an exculpation adapted to them.

But in the present extraordinary case, and as the respondents have reason to believe, that by some means or other, without their knowledge or consent, this petitioner is already pretty well acquainted with the contents of the precognition, the Advocate believes he may adventure, consistently with his duty, to open to your Lordships the sum of the evidence appearing on the precognition against this petitioner. — [Here the substance of the precognition was stated.]

The motion made at Perth for a remit was proper, because of the information the Advocate had received; and so the court found. To complain, therefore, of this, was to complain of the court. But there is no ground for complaining at all: for such remits are very proper, and have been often made. [Here a number of precedents were quoted.]

The opposition made to Mr Haggart's petition on the 2d June was perfectly proper, and agreeable to law; so the court found: and therefore to complain upon this head is to complain of the court.

The deserting the diet on the 12th of June, in consequence of which the prisoner was dismissed, surely can afford the petitioner no ground

ground of complaint.—As to the alledgeance, That the remit had been obtained without any intention to prosecute, because no jury or witnesses were at Edinburgh on the 12th June; it is answered, as to witnesses, It was not the time to bring them, because the relevancy had not yet been debated; and in a trial at Edinburgh, informations were requisite by law. And for the jury, it was no fault of any Advocate-depute that they did not attend, which legally they were obliged to do; for the remit of the trial, was a warning of them *apud acta* to follow it, even as they might have been originally summoned from the county where they live to assist at such trial in Edinburgh.

At the same time, the view or intention of the Advocate-depute at Perth was, no doubt, that in case the difficulty should be removed, which determined him not to insist there, new criminal letters should be served against the prisoner, without insisting for the actual attendance of the Perth jury; and that difficulty not being removed when the 12th June came, the diet was then deserted, and the prisoner dismissed: but there was nothing illegal or oppressive, in detaining the prisoner for a capital crime in the interim, upon his first indictment, so long as the time limited by law for concluding of that process was not elapsed.

It would be a very undue conduct, and what the respondents hope none of them will be suspected of, should the Advocate wilfully, and of design, detain a prisoner the full time allowed by law, either for giving him his indictment, or finishing his trial, on purpose to lengthen out his confinement; and there is not the remotest shadow of suspicion, that such hardship could be meant by the respondents against this petitioner, an utter stranger to them: and yet, if such a thing should happen, it would be no ground of complaint to your Lordships, or any where else, for there would be no end of such inquiries. The law has allowed sixty days to the Advocate for fixing the diet of trial; and, by the same rule, a prisoner who gets his indictment near the end of that term, or who is liberated upon the elapse of it, without getting any indictment, may apply to your Lordships,

Lordships, to make the Advocate shew cause why he was detained so long, and was not either indicted or dismissed sooner; and with the same reason as this petitioner he might cry out, Severity and oppression, and yet in no case that ever happened could it be designed than in this.

In short, the law has made certain provisions for the liberty of the subject, and to prevent undue delay in trials; and when these are not transgressed, there is no room for complaining. The due observation of this excellent law shall always be the inclination, as well as the duty of the respondents, so long as it is their fortune to serve the crown; but when nothing is done to exceed the bounds prescribed by law, and indeed nothing intended, even within these bounds, to harass any of the subjects, the respondents hope, that they shall be protected from being disquieted and diverted from their proper business, by vain and groundless, and especially by loud and opprobrious, complaints of this sort; and that as they believe this is the very first of its kind, it will be so treated by your Lordships as it may be the last.

What is above stated contains the substance of the printed petition and answers, which I have read; but I could find nothing in the record relative to this affair.

For the petitioner, Ja. Graham, Lockhart, Kenneth Mackenzie, Ch. Maitland.

Alt. Ch. Areskine, Will. Grant, H. Home.

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HAGGART, &c. against Hog, &c.

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N^o 95.

July 1738.

DAVID HAGGART, with concurrence of his Majesty's Advocate,

A G A I N S T

Mr JAMES HOG, Minister of the Gospel at Caputh, and Thomas Souter, tenant in Ruffel.

Can execution pass on a verdict, finding several acts of a generic crime proved, each by a single witness?

THE indictment against Mr Hog set forth, "That where, by the law of God, the Common law, and the laws of this and all other well-governed realms, the bribing, corrupting, suborning, and concussing, of witnesses to bear false evidence, or to swear falsely, against any of our lieges, especially in matters capital or defamatory, or to conceal or deny truths consisting with their knowledge, and all attempts or endeavours to the above purposes; the fraudulent enticing, importuning, soliciting, or menacing, of any person or persons, to bear false evidence, or to conceal or deny truth, by money actually given, promises of rewards and good deeds, or by other corrupt and abominable means; and all attempts by fraudulent means to induce others to defame any of our lieges, as guilty of heinous crimes, and thereby bringing them under imprisonment and trial for the same, and, of consequence, under terror of punishment, and even of their lives, and also subjecting them to great charges; especially when such practices are the result of previous ill-will and deadly prejudice, frequently repeated for the space of several months or years, with a wicked and felonious intention to murder an innocent person, falsely slandered, accused, aspersed, or indicted; and when committed by a minister of the gospel, to the scandal of his profession; and where the persons so corrupted, &c. or endeavoured to be so corrupted, &c. are of the number of those over whom he is ordained minister, and thereby under his influence:

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yet true it was—” And then a variety of such acts are charged in three different processes.

This libel was found relevant; and the jury brought in the following verdict: “They, by plurality of voices, find, That the crime of subornation, or endeavouring to suborn people to be witnesses, as libelled against the pannel Mr Hog, is proven in sundry facts, each fact only by one single witness; as to Thomas Souter, the other pannel, we find him art and part in the said subornation.”

It was objected for Mr Hog, That a fact swore to by a single witness is not at all proved. So says the law of God, Deut. xix. 15.; Matth. xviii. 16.; John viii. 17.; 2 Cor. xiii. 1.; the Civil law, l. 19. § 1. C. De test.; Matthæus, tit. 3.; and the law of Scotland; Mack. tit. Probation by witnesses.

Ans. There is a difference as to this matter between a *specific* and a *generic* crime. The first must be proved by two witnesses to the same fact; but the other is sufficiently proved by single witnesses to single facts of the same kind. In this case, subornation in general was charged; and the particular facts libelled are but qualifications of the generic crime charged; *Huber. De testib. § 18. Gail, Carpz. &c. Bisset's case in 1705*; and that of Clerk, same year. And this doctrine is established in England; *Case of Sir William Perkins, tried in 1695 for the assassination-plot*. And in circumstantial evidence it has been held every where, that when all the circumstances are proved, each by one witness, that the proof is sufficient, especially in an occult crime. At any rate, though the crime were not fully proved, that would excuse only from the ordinary punishment, not from a lesser.

Replied, Subornation is no more a generic crime than murder, adultery, or theft. The suborning one witness is as different from the suborning another, as the committing adultery with one woman is different from the committing that crime with another. A criminal prosecution cannot be carried on for a crime in general; a special fact must be libelled, and proved; and unless each fact be proved by two witnesses, it is not proved at all; and the proof of one crime

crime is no proof of a criminal fact of the same kind.—A prosecution for a generic crime is contrary to the natural rights of mankind, and to the law of Scotland. How can a man defend himself against an accusation laid for a crime in general? If a particular fact be libelled, he can call to mind the time and place where he was, and who were present, so as to prepare for his defence: but it is impossible to do so against a general accusation; especially if single witnesses to different facts be admitted; for they cannot contradict one another, or be redargued. The doctors do not treat of this question very distinctly, but, when rightly understood, they support the pannel's plea; *Clarus, Rec. sent. lib. 5. quest. 53. N^o 18. et seqq.*; Farinaceus, in his treatise *De oppositione contra dicta testium, quest. 64. MN^o 200. 217. 228. 232.*

As to the law of Scotland, the pannel has not been able to discover one instance in which an attempt was made to bring a person to trial for a crime in general, excepting Barisdale's case in 1735. The libel against him set forth, That he, and others, did, at different times and places, from April 1734 to 1st December 1735, endeavour, by undue methods, to induce several persons to give evidence against the prosecutors as guilty of stealing; and next it charged particular attempts upon particular persons at particular times and places. But it was found relevant only as to the particular facts libelled with time and place, and the general article dismissed. A proof came out by single witnesses as to these single facts, and the jury found the libel not proved. This decision establishes, that it is not relevant to libel subornation in general. In Mr Hog's case, the interlocutor on the relevancy meant only to find the particular facts libelled relevant. Hence the court checked the prosecutor, when he offered to lead any witnesses upon the general article, and not upon a particular fact libelled; so that this trial proceeded, not for the general crime of subornation, but for particular facts; and as these were only sworn to by single witnesses, and the jury has only found them so proved, the pannel ought to be dismissed.

Further, supposing an attempt to suborn witnesses to prove a particular

particular crime against the prosecution, would have been a relevant charge, and that the evidence of two or three single witnesses, deposing to different acts of the same subornation, might be conjoined and sustained as sufficient, that would not found a condemnation upon this verdict; for in this case three kinds of subornation were libelled; one to prove fire-raising; another to prove incest; and a third, to swear falsely in a process of scandal. The verdict finds the subornation proved by single witnesses, without distinguishing; so that it does not appear but the instances found proved were one of each kind, and these can never be conjoined.

As to the law of England, the forms and rules of trial there are quite different from those of other countries. The oath of one witness may be legal evidence; but all the jurors must believe it: one dissenter will acquit the pannel. Mr Hog would have been safe in England; for the verdict against him was carried but by a plurality. Witnesses in the law of England do not mean concurring witnesses. But to remove any doubt upon this, by a statute of King William it was provided, That from 25th March 1696, no man should be attainted of high treason but by the oaths of two witnesses, either both swearing to the same overt act, or one of them to one and the other of them to another overt act of the same treason: and it is enacted, That if two treasons be charged in one indictment, one witness to one of the treasons, and another to the other treason, shall not be deemed two witnesses in the meaning of the statute. It is therefore quite improper to argue from the law of England in this case. Mr Hog might as well argue from the Canon law, which requires forty-four witnesses to convict a presbyter.

As to the argument, That single witnesses to each fact are sufficient in circumstantial cases, it may be true, that a fact proved by a single witness may be joined as a circumstance with other facts proved by concurring testimonies; e.g. if in a case of theft it were proved by two witnesses, that the prosecutor was possessed at night of an horse, with such marks; that his stable was broke into, and the horse amissing in the morning; and a single witness should swear,

swear, that the pannel was in possession of that horse at three miles distance, early in the morning, and another, that he was in possession of the same horse at twelve miles distance at mid-day, the proof would be sufficient, because the *corpus delicti* was proved, and two witnesses concurred in pointing out the thief, by the possession of the stolen horse, which is a permanent act: but when the *corpus delicti*, as well as all the circumstances pointing out the criminal act, are sworn to by single witnesses, that is not sufficient evidence. In Mr Hog's case, each act is quite distinct from the other; and there is not one circumstance proved otherwise than by a single witness.

The occult nature of the crime might be a reason for admitting witnesses that in an ordinary case would have been rejected; but it is no reason for holding the oath of a single witness to be sufficient evidence.

Insufficient evidence cannot be the foundation of any punishment. The crime is either proved, or not proved: if proved, the ordinary punishment ought to be inflicted; if not proved, none at all.

July 1738, The court decreed both the pannels to be infamous in all time coming, and that they should pay to David Haggart L. 250 Sterling, in name of damages, and be imprisoned till payment; and further banished them both from Scotland for life; with certification, that if they returned, they should be pilloried and transported.

Act. Ch. Areskine, et alii.

Alt. R. Craigie, et alii.

N. B. In the memorial for the prosecutor it is argued, That the verdict in this case was a general one; because it finds the subornation libelled proved in sundry facts; and because it finds Souter was art and part, that is, an accessary; which implies, that Hog was found to be the principal. If the verdict be general, it is no matter whether it went on good evidence or bad evidence, or no evidence at all. It must be decisive whatever the ground of it was.—This memorial also argues, That there is nothing in the objection, That here there was no *corpus delicti*; for in many crimes there is none; as blasphemy, defamation, &c.; nor can there be in a crime which consists

confits of a malevolent intention, expressed by ouvert acts that have not had execution.

There is no answer to this in the memorial for the pannel; from which it should seem, that the pannel had not seen the prosecutor's memorial when his own was written.

a dead body had been interred; and on that account, the altering the form of contested ground was as criminal as raising a dead body

N^o 96. July 12. 1742.

ROBERT JOHNSTON, with concurrence of his Majesty's Advocate,

AGAINST

JOHN SAMUEL.

Sepulchri violati.

THE indictment set forth, "That where, by the laws of this, and all other well-governed realms, the violating the sepulchres of the dead, the raising or stealing away dead bodies out of their graves, is a gross violation of the rights of humanity and Christianity, justly offensive and shocking to all sober persons, and of a dangerous tendency to stir up disorders, in disturbance of the public peace; and is therefore a high crime, and severely punishable: yet true it was, &c." in so far as Causton Johnston, son to the private complainer, was buried on the 1st April last, and his body in a few days afterwards was raised out of the grave, and carried away. The body was seized in his possession, wrapped up in a cloth or bag; upon which he absconded: and when he was afterwards apprehended, there was found in his possession an iron crow, proper for forcing up the lid of a coffin: At least, the child's body was interred time and place aforesaid, and in a few days afterwards was raised, and stolen or carried away, in which he was actor, art and part; and therefore he ought to be punished in an exemplary manner, and decreed to pay a sum, in name of damages and assythment, to the private complainer.

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It was pleaded for the pannel, denying the libel as laid, That this prosecution was a novelty, and not founded in law, there being no statute in this country making the fact charged criminal. The enactment of the Common law, *De sep. viol.* was peculiar to the Romans, and founded on this, that every place was reckoned *religiosus* in which a dead body had been interred; and on that account, the altering the form of consecrated ground was as criminal as raising a dead body.

Ans. When the law of nature, the rights of mankind, and the peace and order of society, are violated, punishment may, and must be inflicted, though there be no particular statute on the case. This prosecution is not a novelty. In the case, the Advocate and Lockhart of Birkhill, against Sir George Weir of Blackwood, tried before the circuit at Glasgow in 1710, the Lords "sustain the libel, in so far as it bears, that the pannel did lift, or cause to be lifted, the bodies of the children of the said William Lockhart out of their graves, relevant to infer the crime *violati sepulchri*, to make the pannel liable to an arbitrary punishment, and for damages; to which the pursuer has restricted his libel."

The court found, "That John Samuel pannel, his being guilty of the crime libelled, or art and part thereof, relevant to infer an arbitrary punishment, damages and expences; and allow the pannel to prove all facts and circumstances which may tend to alleviate and exculpate; and repelled the haill objections," &c.

The jury brought in a special verdict.

The private pursuer passed from any claim of damages.

The court sentenced him to be whipped, and banished for seven years.

Adv. Will. Grant.

Adv. Alex. Home.

Nº 971

N^o 97.

July 1746.

HIS MAJESTY'S ADVOCATE,

A G A I N S T

ANDREW FITHIE, Francis Anderson, and Barbara Coutts.

Murder.—When the indictment against the principal specifies when and where the fact was committed, it is not necessary to libel the time and place of every circumstance charged against the accessory.—What constitutes accession to murder? Does consilium sine ope, or ratihabition?

THE indictment was as follows: "That albeit, by the laws of God, and of this and all other well-governed realms, the threatening to murder any man, and the afterwards violently invading him, and barbarously and inhumanly murdering, and bereaving him of his life, of premeditated malice and intention, and forethought felony, or the exhorting, advising, and instigating thereto, and approbation thereof after committed, and aiding and assisting the murderers in the concealment of the body of the person so cruelly and barbarously murdered, or being art and part thereof, is a most heinous crime, and severely punishable: Yet true it is and of verity, That you the said Andrew Fithie, Francis Anderson, and Barbara Coutts, are each and every of you guilty, or at least art and part, of the said crime; in so far as, upon the 11th day of June, in this present year 1746, or upon one or other of the days of the said month, or of the month of May immediately preceding, the deceased John Catanach, late servant to the said Bailie William Ogilvie, being in a corn-yard adjacent to the village called *Meikle Kenny*, in the parish of Kingoldrum, and shire of Forfar, conversing with some other persons there, and suspecting no harm, you the said Francis Anderson, (who some few days before did threaten to murder the said John Catanach, or put him out of the way), and Andrew Fithie,

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thie, came up to him in the said corn-yard, and, under pretence of having some things to speak of to him in private, you two led him to a corner of the said yard, out of the sight of the persons with whom he had been in conversation; and when there, you both grappled with him, and threw him down upon the ground; and while one of you held him down close on the ground, the other most cruelly and barbarously beat him, and struck him on the head with a stone, till he was disabled to rise from the ground; and then both you, the said Andrew Fithie and Francis Anderson, continued to beat and wound the said John Catanach with stones on the head, until you cruelly murdered, and bereaved him of his life, and left his dead body lying in the place where he was so basely murdered; until you the said Barbara Coutts came, and, upon seeing the said dead body, commended and approved of the murder; but blamed the murderers for leaving the said dead body in a place so open and exposed to view, and advised them to carry it into a stable adjacent to the said corn-yard, the better to conceal the murder, and furnished them with a hand-barrow for transporting it into a house; which, with the assistance of you the said Barbara Coutts, they did accordingly; and in the dark of the night immediately after the murder, they, after having advised with you the said Barbara Coutts how to dispose of the said dead body, the better to conceal the murder, carried it to a remote place, called *Scorrochill*, in the parish and shire foresaid, with the assistance of others, and there threw it into a marl or clay pit; where it was afterwards found, with the head full of wounds and contusions, and the skull fractured by the violence of them. And you the said Barbara Coutts, not only commended and approved of the said murder after it was committed, expressing yourself most barbarously, that the said dead body, when you saw it immediately after the murder, was the blythest or most joyful sight ever you had seen, or in words to that purpose; but further, before the murder was committed, you the said Barbara Coutts exhorted and persuaded the said Francis Anderson to commit it, saying to him and others, That if you were able for John Catanach,

you would murder him, or cut his throat, with your own hands, and sought for a proper instrument for that purpose, particularly a shearing-hook, which you found not perfectly fit for the purpose. And the whole matters and things whereof you are indicted and accused as above, or the most part of them, were admitted and acknowledged by you, as to yourselves severally, and testified and declared, in so far as concern each the others, on the 20th day of June last, in this present year 1746, in presence of George Campbell of Carslegowny, Esq; Sheriff-depute of the Sheriffdom of Forfar, at the castle of Glamis, as appears by your declarations taken down in writing, time and place last above mentioned; the declaration emitted by you Andrew Fithie, being signed by you and the said George Campbell; and the declaration emitted by you Francis Anderson, being also signed by you and the said George Campbell; and the declaration emitted by you Barbara Coutts, being signed by the said George Campbell in your presence, you having declared to him that you could not write; which several declarations are lodged in the hands of the clerk of the high court of justiciary, before which you are indicted, that you may see the same. At least, time and place foresaid, the said John Catanach was basely, cruelly, and feloniously murdered, and bereaved of his life; and you, the said Andrew Fithie, Francis Anderson, and Barbara Coutts, were each of you actors, or art and part, or instigators, advisers, promoters, and concealers thereof. Which," &c.

Various defences, both dilatory and peremptory, were offered for all the prisoners; but those of the last kind pleaded for Barbara Coutts are the most worthy of observation.

It was contended on her part, That as the time when she gave the advice labelled is not set forth, the indictment ought to be dismissed. Further, That the mere advising to murder, *consilium sine opere*, was not relevant *per se*; case of Farquharsons against Macintosh elder and younger, 9th June 1673. In that case, it was charged, that the murder "was done and committed in such a place, and at such a time, by John, Alexander, James, and Robert Macintoshes,

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sons to the pannel John Macintosh elder. And the manner in which the crime is charged in the indictment against the pannels is in these words: *All which was done by the command, instigation, bounding out, and ratification of the pannels John Macintosh or Angus Macintosh, father and brother to the murderers, or one or other of them; and whereof they are actors, art and part; and therefore concluding against them the pains of law.*

It being debated by the lawyers for the pannels, how far command, or bounding out, in the general, could be sustained, as relevant to infer the pannels accession to the murder; the lawyers for the prosecutors did further specify the several expressions and circumstances following, as implying such command or mandate, viz. that John Macintosh the pannel said to his sons these words: "Go to Forfar, arm yourselves with your pistols and swords, take my servant with you, and bring Robert Farquharson dead or alive. 2do, That several times before the murder, he said, He should have his life, for the many affronts and injuries he had done him, though he should were two of his best sons in the quarrel; and who would, or durst, speer after it? 3tio, That at another time, when his servants told him they had met with Farquharson the defunct in the forest of Glengarny, he the pannel cursed and upbraided them for not taking from him an leg or arm, or even his life; declaring, that if they had done it, he should have been their warrant."

As to Angus Macintosh, the other pannel, it was alledged, and offered to be proved, "That the day of the murder, he made search and inquiry in the town of Forfar for the defunct; and having got notice where he was, he sent and hounded out his own brothers, and their accomplices, and his own servant, in arms after the defunct. And after the murder, when his sister was lamenting the loss of two of her brothers who had fallen in the scuffle, his expression was, That she had no reason to lament for them, since they had got the life they were seeking, or words to that purpose."

The lawyers for the pannels contended, That the expressions, con-
descended on did not, import a *mandate* or *bounding out* to commit the
murder. At any rate, as the is charged with a comparative mandate.

Upon which debate the Lords pronounced the following interlo-
cutor: "Sustain the libel against the pannels as art and part; and
"find, That command and bounding out, in general, falls under
"the compass of art and part in such cases: but find the particular
"qualifications condescended on *not relevant* to extend to mandate
"or bounding out, so as to found a criminal pursuit."

Ans. When all the circumstances libelled against her are taken to-
gether, it is impossible to figure a stronger case of art and part; a
term in the law of Scotland, which signifies the concern or hand a
person has had in a crime, who was not the principal, but an ac-
cessory, by advising and assisting. How far the circumstances spe-
cified are sufficient to infer art and part, is an arbitrary question.
This pannel instigated and promoted the whole; she earnestly in-
treated Anderson to do the deed; and without her influence, it in
all probability would not have been perpetrated: So far did her *con-*
silium go. And as to the *ope*, she came in at the conclusion of the
tragedy, ratified and approved of what had been done, and assisted
in concealing it from the eye of justice.

The prosecutor does not maintain, that order or advice is relevant
per se. He is under no necessity of doing so; for in this indictment
it is from all or most of the circumstances, that art and part is infer-
red; Mackenzie, *b. t.* § 3. 8. 9. The *consilium cum ope*, as qualified
in the indictment, is relevant. Persons who conceal the criminal,
or assist him in making his escape, are numbered by the doctors a-
mong those *qui opem ferunt*; *Mattheus, c. 1. § 11.*; Case of Robertson,
stated by Mackenzie, *loc. cit.* This pannel concealed not only the
murderers, but the murder. Where-ever it appears from circum-
stances, that the crime would not have been committed but for insti-
gation or advice, the instigator or adviser are extremely culpable;
and a very good reason is given by Zozius, *Comm. ad. tit. Ad leg.*
Corn. de sic. § 16. Quod consulens sit vere causa moralis influens in ta-

lem effectum. And when there are qualifications of *ratihabition* so strong as those in this case, the doctors declare, that such a *ratihabition comparatur mandato*. At any rate, as she is charged with being art and party that makes a relevancy of itself, it is fair in the prosecutor to libel all the facts to him known from which art and part is inferred; but as several facts, unknown to him at the time of framing the indictment, may come out upon the evidence, the pannel must be remitted to the jury, upon the general charge of art and part, though the facts stated, as inferring it in the indictment, should not be thought sufficient; and therefore the prosecutor has no occasion to combat the decision in the case of *Macintosh*. The judgement in that case finds, that command, or *bounding out*, falls under art and part; that is, command, or *bounding out*, is one circumstance amongst others from which art and part is inferred, and that is all the prosecutor maintains. In the case of *Macintosh*, it was not clear from the circumstances and expressions that he actually designed or commanded the murder. In this case, it will probably appear from the proof, that this pannel was, and considered herself to be, the spring and occasion of all that happened.

As to the time and place, it is not necessary to specify them as to every circumstance previous or subsequent to the crime charged, it is sufficient to specify the time and place when and where the fact was committed. When and where the advice was given, will come out upon proof; and it is charged to have been given before the murder, and will, it is believed, come out to have been given within the time specified in the libel. Her accession after the fact is expressly charged to have been on the day the murder was committed.

Replied, The law expressly requires mention of the place, *l. 3. ff. De accusat.* where the form of an indictment for adultery is shortly given; and all the doctors agree, the time should also be specified; as otherwise the defence of *alibi* would be often excluded: and both time and place are required by *Quon. Attach. c. 80.* In this particular case it was absolutely necessary to mention the time, in order to determine whether it was criminal to utter the expressions libelled;

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for if they escaped from her years or months before the murder, they could not be applied to it, or supposed to have contributed in the least to bring it about.

The prosecutor's answer to this is by no means satisfactory; for time and place ought to be particularly mentioned, either expressly in every article, or by a reference to the time and place formerly mentioned in the indictment. Besides, what is charged in that part of the indictment, from the words, *but further*, &c. is no part or circumstance of the crime of murder charged against the other pannels; it is a separate article, and a separate crime.

In the second place, The advising and exhorting to commit a crime, is not of itself criminal; especially when it is not alledged the advice gave occasion to the crime. An advice by one free subject to another, who has no dependence on the adviser, lays the person advised under no obligation to follow the advice; he is left to his own free-will. Hence such an advice can have little or no effect; and the presumption is, the crime would have been perpetrated without it; so that the prosecutor is burdened with a proof of the contrary; *Menach. De arb. jud. cas. 351. § 19. Voet. Comm. ad tit. Ad leg. Corn. de sic. § 3.* It is true, *consilium* by the Roman law does sometimes subject to an arbitrary punishment; but then such *consilium* denotes a contrivance or machination to help the criminal, and participates of *ops*. Several texts distinguish between a simple advice, and an advice *cum ope*; § 11. *Inst. De abl. que ex delict. nasc. c. 30. § 1. ff. De furt. l. 20. ff. De his qui nat. inf.* Our term *art* likewise imports contrivance or machination.

The articles in the libel which relate to advising and ratifying, are not laid as qualifications or circumstances for inferring art and part, but as constituting a particular crime, distinct from that of murder; therefore the relevancy of these articles must receive a determination. Perhaps the prosecutor had done better, had he charged the pannel with being art and part of the murder, without descending to circumstances; though it seems to be the general opinion of lawyers, that notwithstanding the statute as to art and part, there must be some

some crime particularly charged, to which art and part is to refer. But be that as it may, the libel cannot be now altered, and must be judged as it stands.

3dly, Supposing advising or exhorting were criminal, yet the expressions libelled do not amount to so much. They are but the loose expressions of a woman's tongue, without any determined meaning; and might have proceeded from a momentary quarrel, not worth notice.

4thly, The approving of a crime after it has been committed, and the concealing the person guilty of it, is not criminal or punishable. Some doctors think it is culpable to ratify a crime that has been committed in the name of the ratifier: but that opinion is not applicable to this case; nor is it generally received; *Matthews, c. r. § 14. Voet. Ad leg. Corn. de sic. § 3. Mack. B. r. § 8.*—As to the endeavour to conceal the murder, and not discovering the perpetrators of it, no lawyer ever hinted that was a crime. Concealment is only punished, and by statute, in the case of treason, and is called *misprision of treason*. The being *active* so far as to obstruct the execution of the law against guilty persons is a very different affair. In Robertson's case, there was much more than a bare approbation or ratification.

As to the prosecutor's argument, That art and part is libelled, and makes a relevancy of itself by statute; it is answered, The statute supposes, that a crime is specially charged in the indictment; and it never could mean, that a person might be accused as art and part of a crime not specially charged against himself. Suppose a libel should charge A with murdering B on such a day at such a place, or that he was art and part of the murder, it would not be good; because it does not specially set forth how the crime was committed; and art and part would not supply the defect, because there is no crime properly charged to which art and part could refer. Hence, if two persons are charged in an indictment with different crimes, the clause of art and part must be understood to refer to the crimes charged against each respectively, so as to infer only, that each is art and part of

of the crimes specially charged against himself. Nor is it consistent with common sense to explain it otherwise, so as to bring in the different pannels as art and part of the crimes not charged against them: for could this be done, the article of art and part would extend much wider than the charge in the indictment; whereas it was only intended to comprehend some circumstances of accession to the crime charged, which could not be known till the proof was led. From all which the pannel concludes, that as the libel does not charge her with having any hand in the actual murder, but only with the *separate* crime, of advising and instigating thereto, and approving thereof, the clause of art and part cannot be extended to bring her in as art and part of the murder, but must be understood to refer only to the crime of advising, &c. And with respect to that, she has shown there is not any one relevant alledgeance in the libel.

The prosecutor has libelled on confessions or declarations, which, it is pretended, were made by the pannels. But these being extrajudicial, are not proper evidence. Besides, they were procured by promises and threats. And as to what is called Barbara Coutts's confession, it is not signed by her, and therefore cannot prove against her, supposing it had laboured under no other defect.

The court, July 30. 1746, found "the pannels, or any of them, their having, time and place libelled, murdered the deceased John Catanach, or their being art and part thereof, relevant to infer the pains of death, and confiscation of moveables; and, *separatim*, found Barbara Coutts pannel, her having uttered the expressions libelled, or any of them, or her having, in manner libelled, assisted to conceal the said murder, relevant to infer the pains of law; but for weakening that part of the evidence founded on their confessions libelled, allowed the pannels to prove, that the said confessions were extorted from them by threats or promises: and repelled the hail of other objections and defences proposed for the pannels; and remitted," &c.

The jury, Aug. 1. unanimously found Anderson and Fithie guilty, art and part, of the murder; and likewise unanimously found,

"That

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"That Barbara Coutts did bear ill-will against the defunct John Catnach, threatening to do him mischief; but do not find, that she was accessary to the murder." Upon this, Anderson and Fithie were adjudged to be hanged; and Barbara Coutts was affoizied, and dismissed from the bar.

Att. W. Grant.

Att. A. Pringle.

N^o 98.

July 29. 1767.

JAMES MACHARG of Kiers, and Quintin and Isabel Macharg, his children,

A G A I N S T

COLIN CAMPBELL of Kilberry, Esq; late Major-Commandant of the 100th regiment of foot.

Affidavit is exigible from an officer of the army found guilty of murder by a court-martial abroad, and adjudged by them to be cashiered, though he was not pardoned, but suffered accordingly.

ON the 6th April 1762, Major Campbell was brought to trial, in the island of Martinico, before a court-martial, consisting of thirteen officers, for the murder of Captain John Macharg of the 100th regiment of foot, on the 26th March preceding.

The court-martial pronounced the following sentence. "The court, on due consideration of the whole matter before them, is of opinion, that Major-Commandant Colin Campbell is guilty of the crime laid to his charge; but there not being a sufficient majority of voices to punish with death, as required by the articles of war, the court doth adjudge the said Major-Commandant Colin Campbell to be cashiered for the same: and it is the further opinion of the court, that he is incapable to serve his Majesty in any military employment whatsoever.—Signed by Eyre Massey Lieutenant-Colonel, President, and by Richard Baillie depute judge-advocate,

"and certified by the aforesaid Charles Gould, depute judge-advocate-general of his Majesty's forces."

This sentence was confirmed by the King, and the Major cashiered.

The father, brother, and sister, of the deceased, brought an action before the court of session against Mr Campbell, concluding for £2000 Sterling as an affyithment, founding upon a copy of the proof and proceedings before the court-martial, certified by the deputy judge-advocate-general, of his Majesty's forces to be a true copy, taken from the originals in the office of the judge-advocate-general, kept at the Horse-guards, Whitehall.

The Lord Ordinary took the case to report, and ordered informations. The pursuers annexed to their information the proof on both sides taken before the court-martial; of which they gave the following summary. "It amounts to this, That the defender Colin Campbell having received intelligence, that Captain Macharg had, upon different occasions, expressed himself in an improper and injurious manner of him, the said Colin Campbell did, between the hours of seven and eight of the evening of the 26th of March 1762, write a peremptory letter to Captain Macharg, requiring immediate satisfaction; or, in other words, challenging him to single combat: That immediately upon the back of this challenge, the defender, armed with a small sword in his hand, and a bayonet by his side, repaired to Captain Macharg's tent; whom he found sitting there, having no arms but a broad sword, and, in great heat and passion, called upon the Captain to give him the satisfaction demanded: That Captain Macharg excused himself from engaging upon so unequal terms, as he had then no weapon but a broad sword, an improper instrument to engage with in opposition to a small sword: That the defender thereupon gave the Captain two or three strokes with his sword, and seizing him by the breast, pulled him to the tent-door; whereby the Captain, being obliged to stand to his defence in the best manner he could, when thus unequally matched, received several wounds: That in the struggle they both fell to the ground, the defender uppermost;

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who thereupon, in an insulting manner, threatened him, if he did not beg his life; which the poor young man, in the agonies of death, was compelled to do, and immediately expired: That upon examining his wounds, they appeared to be no less than eleven in number, two of them mortal: That these wounds, when visited by skilful persons, appeared to be given by different instruments, one of them in particular corresponding precisely to the defender's bayonet, which at the time was found lying near to the tent unsheathed: That the only hurt the defender had received, was a single cut in the palm of the hand, which he must have received by his having caught hold of Captain Macharg's broad sword, and the Captain's drawing it through his hand. So that, upon the whole, it had all the appearance of being a foul murder, committed upon this young man, in a manner unarmed.

The proof attempted on the part of the defender, was, *first*, To his character, as not being generally quarrelsome; *2dly*, That he had met with such provocation, as no gentleman of his profession could put up with. And there can be no doubt, that if the defender's behaviour had been in other respects proper, and that this had appeared to be a fair duel, it must have had great weight to alleviate or exculpate, when tried by a jury of brother-officers. But when the other circumstances attending this murder were taken into the scale of evidence, particularly the invasion made upon Captain Macharg in his own tent at that late hour of the night, the inequality of the weapons, the strokes given, the pulling him by the breast to the tent-door, the great number of wounds which the Captain had received, one of them apparently with the bayonet, and which to appearance must have happened after the Captain had fallen, the whole had so black and ugly an aspect, that the court-martial could not avoid pronouncing the defender guilty of murder."

The defender, in his information, alledged, in point of fact, That there were many improbabilities and inconsistencies in the depositions of the witnesses for the prosecutors; and he annexed to his paper the Judge-Advocate's speech to the jury; which is as follows.

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"I apprehend it to be my duty, as prosecutor for the crown, to sum up the evidence; to endeavour to give light to every part of it that may tend to a conviction of the crime, as well as to point out every extenuating circumstance in favour of the prisoner. It has been fully proved, that the prisoner went to Captain Macharg's tent, on the evening of the 26th March last, a short time before his decease. Donald Morison has sworn, That after some expostulation in the tent, they both came out struggling together. Corporal Gillespie has deposed, That the prisoner pulled out the deceased, and struck him three or four times in the tent, without his making any resistance. A disposition so passive is much to be wondered at, under so great an indignity and assault. The number of wounds on the deceased has been sufficiently attended to by the court; and all the evidence agree, he begged his life two or three times.

On the other hand, it must be remarked in favour of the prisoner, that there is no where, in the course of the trial, any positive proof of murder, the crime he is charged with. It is notorious, that he had received gross abuse, and scandalous aspersions, from the deceased, in many public companies; a provocation sufficient to call him to a just account and explanation. And here it may be considered, that in this respect, an officer is often reduced to a most cruel dilemma and distress: he is either necessitated to act against the laws of his country, or lead a life of infamy, worse than death. John Macculloch and James Ralston, evidences for the prisoner, have sworn, they heard a clashing of arms, which continued near three minutes; and the former that he saw a broad sword with Captain Macharg as he came out of the tent, which glanced by the light of the candle; though none of the evidences for the crown heard such a noise, or saw any arms with either. It is evident, however, there must have been arms. Macculloch farther deposes, The prisoner came out first, and that Captain Macharg followed. It appears also, that the prisoner has received a wound in his left hand, partly on the back of it; which is a strong presumption the deceased was armed, and on his defence. I shall not enter into any part of the evidence

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where matter of opinion is concerned, as it can have little relation to the charge. In matters of law, I must own myself ignorant; nor can it be expected I should understand them. However, there is one point I may venture to explain. If the deceased had been found dead in his tent, then the court undoubtedly would be obliged to find guilty. But that was not the case; he was found so at some distance from the tent-door, after a contest and trial for some minutes, between the prisoner and him; which is a strong reason to presume he was armed, and on his defence. In the evidence for the crown, there is a considerable difference with regard to time: but this is altogether matter of opinion; and people will differ in such calculations.

It is now with the court; who will judge according to the matter and evidence before them."

The Lords, on advising the informations, ordered memorials.

Feb. 24. 1767. They repelled the defences, and found an assythment due, by a majority of eight to five, including the Lord President, who was in the minority.

Mr Campbell reclaimed against this judgement. He had pleaded in his former papers four defences: *first*, That murder, not being a military crime, was not cognoscible by a court-martial, but triable only in the ordinary courts.

Ans. He pleaded no such declinature before the court-martial. That court would not have judged the case, nor would the Sovereign have confirmed the sentence, had not the competency been perfectly clear. It is absolutely necessary, that crimes and offences not properly military, should be triable by courts-martial, when armies are sent into foreign parts; and therefore it is no incroachment on the laws and constitution, when the Sovereign, on such occasions, grants commission to the commander in chief of the British forces abroad, to hold courts-martial for the trial of all crimes and offences. Had the court-martial acquitted the defender, their sentence of acquittal would have barred any after trial before any other court for the purpose of inflicting punishment; and if an acquittal by that court would

would have operated in his favour, a conviction or sentence condemnatory by that court must operate with equal force against him.

Second defence: The crime charged having been committed in a foreign country, not subject to the jurisdiction of this court, it cannot take cognizance of it.

Ans. This defence supposes, that crimes of the deepest dye are local; which is a mistake. [See the argument for the crown in Taylor's case, N^o 76.]

But further, there is no criminal prosecution carrying on before the courts of this country against the defender for the murder committed in Martinico. The trial before the court-martial there is a perpetual bar to any after prosecution for that crime; though, according to the first defence, it ought not to have that effect. This action is a claim of civil right for damages, arising *ex delicto*; of which the defender has been convicted by the sentence of the proper court upon complete evidence. *Delinquendo contraxisse videtur*; and therefore, though it were incompetent to prosecute him in Scotland for a crime committed in Martinico, it is clearly competent to pursue him here, or where-ever he has a *forum competens*, for damages.

These two defences were dropped in the defender's reclaiming petition, which was confined to the other two; and these it stated as follows.

Upon the *first* of those points, the petitioner proposes, humbly, to maintain, That the action of assythment known in the law of Scotland in the case of murder, is only competent, where the sovereign, in virtue of the prerogative of mercy, interposes to rescue a criminal from the punishment of the law, by granting a remission.

A due attendance to the origin of assythment in our law, may probably enable us to form a distinct idea of those cases to which this action is properly applicable. It must be obvious to every person who reflects on the origin of society, and of nations, that criminal judicatures would gain footing much later than any other of those

those institutions which every civilized country finds absolutely necessary for the subsistence of society. The barbarity of such times would not subject itself to the controul which arises from a system of regular punishment; and accordingly, if we can believe those writers who have been at pains to trace the origin and progress of society, they seem all to agree in this proposition, That in barbarous ages there was no established or regular system of punishment, but every person was the avenger of his own wrong.

Such practices might subsist in an age, where, in every other particular, there was a corresponding rudeness and barbarity. But it is obvious, that in such a situation, society could not subsist, so soon as any principles of law, good order, or government, came to be understood. Accordingly, the next step in society was, to lay hold of the avarice of men, to deprive them of the dangerous privilege of avenging themselves, and to fix stated compositions, to be paid by the offender to the party injured. These were accordingly ascertained in all the northern countries, (*Tacitus, De morib. Germ.*), as well as in Scotland, (*Reg. Maj. lib. 4. cap. 19. et 42.*), for the most atrocious, as well as the most trifling crimes, under the several denominations of *Croo, Galnes, Vergelt, Kelchyn, Enach, &c.*

Although this method of redeeming guilt by a pecuniary ransom, was in some degree better than the other method, of every person being his own avenger; yet it was impossible that so unsuitable an idea of punishment could long prevail, when society continued to make its natural progress. By such punishment as this, a manifest advantage (if a licence to commit crimes can be called an advantage) was given to the rich over the poor. It became necessary that a mode of punishment should be established, which lays an equal restraint upon all degrees of men. And hence government, by degrees, came to assume the power of inflicting punishment in more atrocious crimes, without regard to the wealth or dignity of the offender.

As it is impossible that any system of law whatever can be compiled, so as to touch every particular case that may occur, this necessarily produced that power of mitigating the rigour of law, where particular

particular alleviating circumstances called for the interposition of the Sovereign, in whom the power of listening to the cries of mercy came in this manner to be centered.

But however necessary this part of the royal prerogative might be, it is easy to conceive, it would, in its origin, be viewed with a very jealous eye, by a people whose barbarity would still teach them to relish the idea of being their own avengers; and when they had only yielded up their right to a pecuniary ransom, to the hopes of satiating their revenge by public punishment, they would not wish to see that prospect disappointed by an untimely interposition of royal mercy. Accordingly we see, (*Stat. Dav. cap. 50.*), that our kings at first gave up the privilege of pardoning for the more atrocious crimes, without the consent of parliament; and afterwards they assumed it (*ib. cap. 44.*) only upon condition that the injured party should be satisfied, and gave their consent.

This seems to be the genuine origin of the penalty exigible by the injured party from the offender, known in our law by the name of *assythment*. It was the natural result of the times: for as, on the one hand, it could not be expected that a barbarous age, who had been accustomed to receive a peace-offering for the death of their friend, would yield up that right, and at the same time be disappointed of the public punishment, in consideration of which they had yielded it up; so, on the other hand, it was as little to be expected, that a sovereign would yield up so bright a jewel in his diadem, as the right of pardoning offences, when favourable and alleviating circumstances occurred. Hence the right of the injured party to assythment, in every case where the sovereign interposed to stop the course of the law, by granting pardon to a criminal. And the intendment of this assythment was a *solutium*, or peace-offering, to appease the rancour of the injured party.

And accordingly this is the idea given to us by our lawyers of the right of the action of assythment. Thus President Balfour, the most ancient, and not the least accurate, of all our writers upon the law, has given us the account of this assythment for slaughter, p. 516.

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"Be the law and consuetude of this realme, the assythment or kin-
 "but, maid or adjudgit to be payit, be the committaris of slaucher,
 "to the kin, bairnis, and freindis, of ony persoun that is slane, is
 "sevin to thame in contentatioun of the hurt, damage, and
 "skaith, sustenit be thame throw the wantring of the persoun that
 "is slane, and for skaith incurit be thame thairthrow, and for paci-
 "fying of thair rancor."

This idea is further illustrated by the style of letters of flains, (Balf. p. 517.), which of old were granted by the nearest of kin, in case of remissions, to the offenders; which still clearly points out an assythment, as a peace-offering, to appease the rancour of the friends of the deceased person. They proceed upon the narrative, That the offender having now given evidence of his remorse, and likewise an assythment according to his abilities, and better support of the de- funct's children; and considering likewise, that his life, were it ob- tained by the course of justice, would prove of no avail to us; therefore, (Dallas, p. 862.), "we, by thir presents, for ourselves, "and taking burden, as said is, forgive, pass over, and for ever "forget, and in oblivion inter all rancour, malice, revenge, preju- "dice, grudge, and resentment, that we, or those for whom we take "burden, in manner foresaid, have, or may conceive, against the "said A. P. or his posterity, for the crime foresaid; and hereby ex- "oneris and discharges him of all action, civil or criminal, compe- "tent thereupon, against him, or his estate and goods, for now and "ever, and hereby frankly and freely consent, and beg, and ear- "nestly intreat his Sacred Majesty, to grant to the said A. P. a "full, free, and ample, remission of the said crime and slaughter, "and what thereupon may ensue; and to dispone to him the escheat "of his own moveable estate, in respect of the foresaid assythment "now given."

As this notion of appeasing rancour and revenge by an assythment, is mentioned as the object of it by our ancient lawyers; so in like manner the same idea is conveyed to us by our most modern writer on the law of Scotland. Bankton, b. 1. tit. 10. § 2. *Assythment*, says,

"An assythment will not infer a representation of the deceased, because it was no part of his estate, and is only a satisfaction due by law to the wife, and such as might succeed as executors to the person killed, in order to their being reconciled to the manslayer; and thereby contribute to his obtaining a remission."

Such therefore being the origin and notion of an assythment, it seems to follow as a necessary consequence, that it can never be due when the rancour and malice of the injured party is otherwise satisfied and appeased. If death ensues, it is agreed on all hands, that no assythment is due, upon this principle, That the blood of the criminal must wash out every spark of resentment. If, again, the supposed criminal is acquitted upon trial, he is pure in the eyes of his country; and the law will not permit private revenge to set itself in opposition to public decrees. The only case, therefore, where there can be room for assythment, is that case where a criminal is convicted, and by the particular interposition of the sovereign is rescued from that punishment which the law has affixed to his crime: for in that case, the injured party is intitled to indulge his rancour, and to call for vengeance; because the verdict of his country has declared there is just ground for resentment. If therefore the sovereign shall interpose his royal prerogative, and set it in opposition to that just desire of expiation which the law has indulged, and the principles of human nature have implanted in the mind of every injured person in such circumstances, then the injured person is intitled to call for vengeance in another shape, and to demand that satisfaction which was competent at those early periods of the law, when the mercy of the sovereign would not have been allowed to interfere.

But as such a claim of private vengeance does, from the nature of the thing, arise solely from the interposition of the sovereign; so it appears to follow, upon the same principles, that there is no such claim known in the law of this country, when the sovereign does not interfere, but allows the law of the land to have its free and unlimited course; and therefore, in the present case, the petitioner does, with humble submission, contend, that there are no *termini habiles*

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biles for an assythment, as the sovereign has not interposed, but the sentence pronounced against him by his judges has been carried into full and ample execution. If an assythment was to be given in such a case, the injured party would be indulged with a twofold expiation; first, that which arises from the public punishment inflicted; and next, that of a pecuniary ransom, which is claimed. This, with submission, is a degree of severity of which there is no vestige to be found in all our law. Sometimes we see the vestige of murder expiated by a pecuniary ransom, at other times we see it expiated by the execution of a public sentence; but a conjunction of both public and private expiation against the same offender, in a case of this kind, is what none of our lawyers have talked of; and of which, if the petitioner is rightly informed, there is not an example in the whole history of our law.

It is extremely true, that the petitioner has not suffered the punishment of death; but he has suffered that sentence which his country returned against him, and which therefore, by every rule of criminal procedure, must be held as an adequate expiation for the offence of which he has been convicted. It is no matter whether that sentence is a just or an unjust sentence; it is the sentence of a legal court, and therefore, in the eye of law, must be held as unexceptionable. If the petitioner had been totally acquitted, he would have been pure and untainted in the eye of his country; and upon the same principles of credit due to the sentences of a court, he must be held to have suffered his due punishment, and to have made an atonement to the public and private satisfaction.

If the petitioner has been successful in tracing the origin of assythment, and defining those principles upon which it is due, then, with great submission, the doctrine now laid down seems consequentially to follow. And he is the more encouraged to maintain this doctrine, because, upon a perusal of our statutory law, from its earliest period, it seems to be always taken for granted, that an assythment only took place when the King by a remission interposed to stop the free course of the law, and thereby disappoint the lawful

vengeance of the injured party: *Id. Reg. Maj. book 4. cap. 17. p. 4.*; act 46. James I. anno 1425.; act 7. anno 1528.; act 136. anno 1584.; act 157. anno 1592.; act 173. anno 1593.; and act 178. anno 1593.

In all these statutes the assythment and remission are inseparably joined together, and the one seems to be always understood as a *quæ non* of the other. These statutes, therefore, afford the strongest presumption, that it was the sense and understanding of the legislature, that assythments could be claimed only where remissions had been granted: but the petitioner avoids entering minutely into a discussion of each particular statute above recited; because no observations which he could suggest, could be so satisfactory as the express opinion of Sir George Mackenzie upon the import of these statutes, which he has delivered in his observations upon the act 7. anno 1528.

By this act, persons who take themselves to remissions are obliged to ally the party; and in the end of the act there is the following exception: "And as for slaughter and mutilation, to keep the order of the act made thereupon of before." This learned author says, That the meaning of these words is, that slaughter and mutilation are not comprehended under this act; because, by the 63d act, parl. 6. James IV. no remission can be granted for these crimes; and therefore there can be no assythment. Here he gives his opinion, in words which cannot admit of ambiguity, that an assythment could not be claimed, except in the case where a remission had been granted.

Besides this express opinion of an author so respectable, and who could not fail to be well acquainted with the subject upon which he was writing, there is another consideration, which, in the petitioner's apprehension, goes very far to put this matter out of doubt. From those various statutes of most ancient date already referred to, it is evident, that the action of assythment was known at the most early periods of our law; and yet, during a course of so many hundred years, a single example will not be found where an action of assythment has ever been brought, except in that single case, where

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the sovereign has interposed, by granting a pardon to interrupt the free course of the law. If in any case, then, practice can be admitted to explain the meaning of a law, this negative evidence is stronger than any positive opinion which could be adduced, in order to prove the universal sense and understanding of a nation. If there had been even a doubt upon it in the opinion of lawyers, it is impossible to conceive a satisfactory reason why no lawyer should ever have advised an injured friend to betake himself to a legal remedy to satisfy private vengeance, except in that particular case where the mercy of the sovereign has interposed to stop the course of public satisfaction.

It is impossible to suppose that opportunities would be wanting, in such a period of time, for bringing this matter to a trial, if it had been thought tenible by our lawyers. One obvious case immediately presents itself to our view, that of a criminal escaping from prison after his conviction, and before the execution of his sentence. This must have been the case of many criminals who were possessed of estates, against which a debt of assythment might have been constituted; and yet it does not appear that this method of procuring satisfaction, the only one which in such circumstances remained, ever occurred to any lawyer, or to any injured friend of a murdered person.

Although the account given by the petitioner of the nature of assythment seems consistent with the origin of that action, as likewise with the tenor of our statutory law, from its early periods, as also with the opinion of those lawyers who have defined to us the purpose and intendment of an assythment; yet the pursuers have contended, That this action was not to be considered merely as a *solutum*, or peace-offering, but as an *actio rei persecutoria*, for the reparation of the patrimonial damage sustained by the injured party.

This opinion seems chiefly founded upon the words made use of, both in our statutes and our law-writers, who speak of an assythment as making up the *loss*, the *skait*, the *damage*, the *reparation*, of the injured party. But, with great submission, it is rearing too

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great a fabric upon so slender a foundation, to argue from the words made use of in describing an action, contrary to what appears to be the origin of that action; contrary to the express definition of our lawyers, who in various places talk of an assythment as intended for *appeasing malice and rancour*; and contrary to that uniformity, for so long a period, of applying this action solely to those cases, where the just vengeance of an injured party had been disappointed by the pardon of the King interposed to stop the course of the law.

But further, the petitioner begs leave to say, there are various particulars acknowledged with regard to an assythment, which are perfectly inconsistent with the idea of its being an *actio rei persecutoria*, or of its being viewed in any other light than as a peace-offering, for the purpose of satisfying the vengeance of those whom the law considered to be injured.

1^{mo}, If your Lordships will attend to the old compositions which are mentioned in the *Reg. Maj.* and our old law-books, you will find them all proportioned according to rank, and not to estate; nor do they vary upon account of any pecuniary loss which the family of the injured person may have suffered from his death. This naturally suggests the idea, that the satisfaction of resentment was the only object of assythment; for otherwise the law could never have failed to have paid some regard to the wealth and circumstances of a deceased person, by which only was the patrimonial loss of his family affected.

2^{do}, It is laid down by Balfour, tit. *Apsythment*, cap. 6. That one kinsman cannot pursue for assythment without the concurrence of the rest. This rule is perfectly intelligible, upon the petitioner's hypothesis, that assythment was only intended to satisfy resentment; in which view, the appeasing one kinsman could be of no avail, if the rest were left at liberty to prosecute their revenge. But if, according to the pursuers doctrine, assythment was intended for the reparation of a patrimonial loss, it does not occur upon what principle the right of one kinsman to pursue could in any degree depend, or his action be frustrated by the failure of the rest to concur.

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3th. It has never been said, that the action of assythment was competent to any other than the nearest of kin of the deceased. This is easily accountable, upon the principle, that the law considered them as the only persons whose minds would be provoked to revenge, and therefore the only persons to be satisfied. But if the action of assythment was due for the reparation of a patrimonial loss, it does not occur why the action should never have been brought at the instance of any other third party who is injured. Why not at the instance of the personal creditor of the possessor of a tailzied estate?

4th, Was it ever heard of, that it was pled in defence against an action of assythumbment, that the pursuer was rather patrimonially benefited than hurt by the death of his friend? Surely many examples could be adduced, where the life of a man was rather a burden than an advantage to his friends or his family. And the petitioner begs leave humbly to maintain, that such a defence would be relevant, and admissible to proof, if the action of assythumbment was intended as the reparation of a patrimonial loss, and not as a peace-offering to appease resentment.

Lastly, It is admitted on all hands, that affygment is not due when the guilty person has suffered the last punishment of the law. Now it is difficult to conceive, upon what principle this doctrine can be reconciled with the doctrine, that affygment is for a patrimonial loss; for surely the public punishment of the criminal ought not to deprive the injured person of his right to pursue for his debt, if such a right of action was at all competent to him.

The pursuer, sensible of the weight of this observation, has used various arguments to elide the force of it; particularly it has been said, That the guilty person suffering has no funds out of which to satisfy the assythment. But this answer, with great submission, does by no means remove the difficulty.

It is extremely true, that the moveables of a condemned person do, by his sentence, become escheat to the crown: but can it be imagined, that the sovereign would not have burdened the escheat at any time with an assythment, if the assythment had been considered

as exigible when a party suffered, or as a debt to which his friends had any equitable claim? or if the avarice of the fisc had neglected to do so, is it credible that the legislature would have failed to interfere in so clamant a case? more especially when we see, that in very ancient times, the legislature interposed, by an express statute, 1592, c. 145, in a case exceedingly similar; namely, to burden the escheat, whether by gift, assignation, or otherwise, with the payment of the debt contained in the horning whereupon the escheat fell? If, therefore, assythment had ever been viewed in the light of a reparation for a pecuniary loss, is it possible to believe, that the legislature, which, by such a variety of statutes, has taken care of assythment in the case of remissions, would not likewise, upon the same principles as in the case of escheat upon a civil debt, interposed to burden the escheat with the debt of assythment, if assythment had been considered as a patrimonial right, and consequently exigible, notwithstanding the suffering of the offender?

But further, if assythment was not exigible in the case of the offender's suffering, merely because there was no fund to pay it, on account of his moveables being escheat to the crown, this doctrine would go very far, and must apply to every case where the same thing took place. Now, by express statutes, 1551, c. 19.; 1581, c. 118.; 1597, c. 247. in the case of perjury, bigamy, enforcement, breach of arrestment, and usury, the single escheat falls to the crown; and therefore, in all these cases, upon the same principle, no action would be competent for the reparation of any patrimonial loss arising from the commission of those crimes.

This solution of the difficulty, therefore, is altogether unsatisfactory; and if it proves any thing, it implies a contrary proposition: for when the whole statutes, from first to last, so attentive and careful to the interest of those intitled to an assythment, are considered, it is impossible to suppose, that the legislature ever viewed the right of assythment as a patrimonial right, or in any other light than a peace-offering to satisfy resentment; or it would certainly have taken care,

care, in some shape or another, that the escheat should be burdened with the payment of so equitable a debt.

But further, this solution of the difficulty is most unsatisfactory in another view: for although the moveables fall to the crown, yet the landed estate does not likewise become forfeited, except in very particular cases, such as treason, &c. Here then is a fund for the assythment; and why has an action never been brought to affect a real estate? It will no doubt be said, That *actiones ex delicto non transcunt in heredes*. The maxim is true; but it is equally true, that *lites contestate cum defuncto etiam transcunt in heredes*. And what prevents the injured party to bring his action before the execution of the sentence, or what prevents him from bringing it at any time, in the case of a criminal escaping from jail after conviction? in both of which cases the debt might be constituted against his real estate; and its never having been attempted, can be accounted for upon no other principle, except that it never was thought to be competent, but when a guilty person screened himself from justice and public satisfaction, by obtaining and pleading upon the pardon of the crown.

Upon all those grounds, the petitioner flatters himself he has satisfied your Lordships, as well from the origin of the action of assythment, as from the cases in which, and none other, it has been always demanded, and from the other acknowledged particulars in the action of assythment, that it was not an *actio rei persecutoria*, but merely a *salatium* or peace-offering, to appease the resentment of the injured friends; and therefore was not competent, except in that special case, where the just resentment of the friends was disappointed by an interposition of the sovereign, to impede and interrupt the course of the law.

And having said so much, it is scarcely necessary to make the application of these principles to the present case. The petitioner did stand his trial; he received sentence; that sentence has had free and unlimited course; the law, as declared by a court legally constitute, has had full scope; and the sovereign has in no shape interposed to set his royal mercy in opposition to the judgements of the law: and

therefore, agreeable to the principles above maintained, the petitioner does not fall under that predicament, in which only, by the law of Scotland, there are *termini habiles* for an action of assythment.

The petitioner next proceeds to state to your Lordships some observations upon the other branch of the argument, namely, To show, that at any rate the sentence of the court-martial, proceeding upon the proof led before them, cannot be received or admitted as legal evidence of the alleged murder, *ad hunc effectum* to found the pursuers in an action of assythment and damages.

Upon this point, the petitioner shall confine himself to a few observations, which, he is advised, do naturally suggest themselves, from considering the common course of judicial procedure in this country. And it will be observed, that the only evidence of the alleged murder is the evidence adduced before the court-martial, and the verdict pronounced by them upon that occasion. Indeed he is the more at a loss to argue upon this point, because he does not certainly know, whether the judgement of your Lordships proceeds upon the verdict of the court-martial as *probatio probata* by itself, or if your Lordships, in judging of this cause, thought yourselves at liberty likewise to enter into the evidence upon which the verdict proceeded; the petitioner, however, shall endeavour to state the argument in both views. And,

imo, He does humbly beg leave to deny, that your Lordships are at liberty to enter into the evidence emitted before the court-martial in this question of assythment now before you. And, in maintaining this argument, the petitioner does not desire to consider this court-martial in any other view than the court of justiciary, the court of admiralty, the court of exchequer, or any other supreme court of this kingdom. It may be extremely true, that your Lordships, from a *comitas*, and degree of credit due to other supreme courts, pay a just regard to their judgements, as to matters coming properly before them; but the petitioner does beg leave to doubt, if there is any example in course of judicial procedure, where evidence led in one court for one purpose, has been admitted as evidence in another

another court for another very different and separate purpose. The evidence adduced before the court-martial against your petitioner, was solely in the view of punishment, and therefore, if that evidence shall now be made use of in this question of civil reparation, it is certainly converting it to a purpose for which it never was intended, and which never entered into the minds of any one person concerned in the examination of these witnesses.

Let us only consider, how such a practice would apply to other cases. Suppose two debts of L. 500 each, and which were competent to be determined either before your Lordships or the court of admiralty, and the merits of both debts depending upon the state of evidence; if the one debt was pursued for before the court of admiralty, and the action determined in favour of the pursuer, could that pursuer, if he thought proper afterwards to bring his action for the other debt before the court of session, insist, that your Lordships should admit the evidence led in the other cause before the court of admiralty, as evidence before your Lordships? If such a plea should be maintained, it would certainly be over-ruled: and yet the affinity betwixt the two cases would be stronger than the present, where the evidence in the one case is adduced solely for punishment, and afterwards converted, in the other, into evidence merely for civil reparation.

Again, if a person should be tried criminally before the court of justiciary for the forgery of writings, and should be condemned on that account; if the person injured by those writings should afterwards bring a civil action for improbation of them before the court of session, the petitioner does not believe your Lordships would allow the evidence led before the court of justiciary, in the criminal process for punishment, to be admitted as evidence in the civil action of improbation before your Lordships.

The petitioner must beg leave to bring your Lordships in remembrance of a question lately depending before you, where a dispute similar to the present occurred. It was in the action at the instance of Peter Williamson, against some merchants in Aberdeen. An action

had formerly been brought, at his instance, against the magistrates of Aberdeen, for oppression and damages; wherein he adduced a variety of witnesses, in order to prove his being improperly carried off from his parents in his younger years. He afterwards brought another action, against those whom he supposed guilty of this injury; wherein he endeavoured to bring in the evidence which had been adduced in the other action against the magistrates of Aberdeen. But although the witnesses proposed to be made use of were precisely to the same fact, your Lordships, upon a debate of parties, would not allow evidence led in one cause, for one purpose, to be adduced as evidence in another cause, betwixt different parties, and for a different purpose. And here it will be observed, that the demand is stronger; for, not only is the evidence here endeavoured to be made use of in a different cause, for a different purpose, and betwixt different parties, but likewise in a different court; which was otherwise in the case just now put.

In the court of exchequer, it every day happens, that the condemnation of the ship, and the condemnation of the cargo, depend upon the self-same evidence; but it never was heard of, that the evidence adduced in the one case could be made use of for bringing about the forfeiture in the other.

In short, the petitioner knows no example in any court of this country, or in the course of judicial procedure in this country, whose evidence, led either in the same, or in a different court, for one purpose, has been made use of in another cause, or for a different purpose. This is precisely the case here: for the civil action for assythumbent before your Lordships, is as distinct from the criminal action before the court-martial at Martinico, as any one action can possibly be from another. The petitioner, therefore, takes it for granted, that your Lordships have proceeded upon the sentence of the court-martial, as *probatio probata*, by itself, of the alledged murder; and in that view shall next endeavour to show to your Lordships, that that evidence can be admitted with as little propriety as the other.

The general principles of society require, that courts should pay regard

regard to the judgements pronounced, not only by courts in the same country, but likewise by foreign courts. Hence it is, that when judgement is given for a debt in England, or any other country, it receives execution against the goods or person of the debtor in this country. But it is obvious, from a very small attention, that this practice does by no means apply to the present case: for in all such cases your Lordships only interpose to put to execution the decrees of other courts, as to the purpose and intendment for which those decrees were pronounced; but your Lordships do not take the judgement of another court to apply to a purpose for which it was never intended.

To illustrate our meaning, let it be supposed, that your Lordships jurisdiction extended to the case of cashiering an officer, or declaring him incapable to serve his Majesty, then you could, with propriety, have adopted the sentence of the court-martial, as evidence before you, to the effect of cashiering or declaring incapable; because these were the objects in the view of the judges who pronounced the sentence; and therefore you could, with propriety, be said to carry the sentence into execution. But this is something very different from the present case, where your Lordships are not desired to carry into execution the intendment of the judge who pronounced that sentence; but you are desired to make use of the sentence, as *probatio probata*, before you, for a purpose altogether different from the original purpose of the judgement.

It seems therefore to be clear, that that principle which leads your Lordships to give execution to the judgement of other courts, does not at all apply to the case in hand; which is not a question concerning the execution of a sentence, but concerning the admission of that sentence as *probatio probata*, in another cause, and for a different purpose.

And here the petitioner must again beg leave to bring under the view of your Lordships the case of the creditors of Mr Carr against Bontain of Mildovan, 27th November 1739. In that case your Lordships found, That the verdict of the jury, in the trial before
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the court of justiciary, where the pannel was convicted of theft, was not *probatio probata* in the action of damages before the civil court. Indeed the petitioner cannot even agree to the propriety of this decision, in so far as it even admitted the evidence led in the court of justiciary to be pled upon before your Lordships: he has already explained the reasons why he does humbly imagine the decision was erroneous in that respect. This however is not strictly to the present argument, which is only, Whether the verdict of the court-martial is to be received as *probatio probata* before your Lordships? As to which question the petitioner does humbly apprehend, that the decision above quoted is in his favour expressly in point: for your Lordships will not surely pay greater regard to the sentence of a court-martial, than to the verdict of a jury in the court of justiciary, which your Lordships did expressly determine not to be *probatio probata* before the court of session.

Various specialties have been endeavoured to be found out in this case, in order to prevent it from affecting the principle for which the pursuer contends; and in particular it has been said, That various favourable circumstances occurred which shaked the credit of that verdict, and weighed with your Lordships not to receive it as *probatio probata*. But, with great submission, this is giving up the question: for if a verdict is to be received as *probatio probata*, it is impossible that any favourable circumstances could be allowed. For it either is or is not to be admitted as complete evidence. If the former, then no circumstance could possibly be allowed to enter into the consideration of the court; but the verdict, whether just or unjust, whether well founded or ill founded, must be held *pro veritate*. If the latter, then that is the very argument which the petitioner does now maintain.

It has been said, That if the verdict of a jury, or the sentence of a court-martial, was not to be admitted as *probatio probata*, then your Lordships could have no evidence, as you were not a court competent to lead evidence, or take trial of murder.

But in answer to this, the petitioner begs leave to observe, that if
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this doctrine be true, it can only serve as an additional argument, why assythment can never be due, except in the case of a pardon; where there is no necessity for evidence, because the pleading the pardon is a virtual confession of guilt.

If, however, your Lordships, contrary to the petitioner's humble expectation, should be of opinion, that assythment is due in any other case, then he does humbly contend, there is no rule to bar your Lordships from adducing evidence of the murder before yourselves. It is extremely true, that your Lordships are not in one sense a competent court to take trial of murder; but that proposition goes no further than to say, that the court of session is not a criminal court competent to try murder in the view of punishment: but if in any one shape whatever, it becomes material for your Lordships to instruct that fact in a civil question before yourselves, the petitioner does humbly maintain, upon the general principles of jurisdiction, that your Lordships are intitled to adduce whatever evidence may be necessary for expediting any business which comes properly under your cognisance.

Various examples of this will immediately suggest themselves to every man's observation. Thus your Lordships have not an original jurisdiction in questions concerning marriage; but yet, when in cases of aliment, or such like, it is necessary to instruct the fact, you are uniformly in the custom of adducing evidence before yourselves for that purpose.

In like manner, questions of bastardy are strictly consistorial; but where-ever the right to a succession, or any other civil interest, turns upon such a fact, your Lordships never hesitate to adduce evidence, and determine upon the legitimacy of a claimant.

Another example, equally strong, if not stronger than any of these, occurs in questions concerning revenue-officers in the execution of their duty. Your Lordships have certainly no proper jurisdiction to determine upon the legality or illegality of a seizure; but yet, previous to the late act of parliament, making a certified probable cause of seizure a bar against every action at the instance of the defendant,

defendant, you had daily suits at the instance of parties who had been acquitted upon their trial in the court of exchequer; the purport of which actions was for civil reparation. And this example is the stronger, for this reason, as it directly contradicts the pursuers doctrine, of your Lordships receiving a verdict as *probatio probata*; for in all such cases your Lordships instructed the fact by evidence adduced before yourselves, and did by no means admit the opinion of the jury in the court of exchequer, as *probatio probata* of the illegality of the seizure.

It is humbly hoped these observations and examples will satisfy your Lordships, that if in any case an action of assythment can take place except in the case of a pardon, you will likewise be intitled to take evidence of the fact; and therefore that difficulty can be no reason why the sentence of the court-martial should be *probatio probata* of the alledged murder; and upon this, and the various other grounds already suggested, the petitioner does humbly submit it to your consideration, that although an action of assythment was competent in this case, still there is no legal evidence of the material fact before the court.

But, 2^{do}, *et separatim*, upon this head, even although the petitioner was wrong in this plea, and that the sentence of the court-martial could be received as *probatio probata*, still he maintains, there is nothing in that sentence to be the foundation of the present interlocutor.

The crime charged is murder foully committed on the body of a brother-officer; a crime of which the petitioner denies he was ever guilty; and he does maintain, that, upon trial, it has been found so by his country.

The amount of the sentence is, That the petitioner should be cashiered, and be incapable to serve his Majesty in any military employment. These may be punishments adequate to lesser misdemeanors; but it is impossible that such a sentence could ever be pronounced by any court who were of opinion that the petitioner had been guilty of a foul murder.

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The only words in the sentence which can justify a contrary construction, is that part of it which declares the court of opinion, that the petitioner had been guilty of the crime laid to his charge, but there was not sufficiency of voices to punish with death. Now the petitioner begs leave, with great submission, to maintain, that whatever suspicions those words may convey to the minds of your Lordships, as to the opinion of any number of the court-martial, still this sentence does not contain a conviction of the petitioner as guilty of murder.

Whatever credit the Lords of Justiciary, as private men, might give to the opinion of seven of a jury, consisting of fifteen, still that person who had the voices of the remaining eight, is a free and innocent man in the eyes of his country. This is undoubted, and will not be controverted; and yet, if the petitioner is not greatly mistaken, the sentence of the court-martial now before your Lordships, however inaccurately worded, is the same in substance and sound sense: for the meaning of it is nothing else, than that such a number of the court-martial as is necessary to make a legal majority, were not of opinion that the petitioner merited death; that is, in other words, were not of opinion that he was guilty of murder; for it is impossible that a legal majority could have been of that opinion, and at the same time not have been of the other opinion, that the petitioner merited death.

It is no matter what may be the opinion of your Lordships as to the import of the evidence; for if you are at all to admit the sentence of the court-martial as evidence, you must take it as it stands: and indeed it would be unfair to do otherwise, as the manner of emitting their testimonies, together with a variety of other particulars, might influence the judgement of a jury or a court-martial, although these do not appear upon the face of the depositions, and therefore cannot have the just weight with your Lordships. And in this view the petitioner does humbly submit, that whatever inaccuracy there may be in the expression, it is impossible to believe, that a legal majority of that court-martial were of opinion that the peti-

tioner was guilty of murder, or they must likewise inevitably have been of the other opinion, that he merited the pains of death.

By the law of England, juries must be unanimous: and therefore, although eleven of the twelve should return to court, and give it as their opinion, that the pannel was guilty; yet, by the single voice of the other one, he would stand a free man, innocent in the eyes of his country.

Put the case, that a jury should return their verdict in a case of murder, finding the libel proven, but the pannel not guilty; whatever opinion or suspicions your Lordships might conceive of the sentiments of such a jury, as to the pannel's guilt, still, under such a verdict, he would be as innocent a man as any of his countrymen."

Ans. "The general proposition which the respondents take the liberty to assume as an universal rule, founded on the clearest principles of law and justice, is, That in all cases, without exception, where a party suffers an injury or damage, *dolo vel culpa* of another person, the party injured is intitled to have a suitable satisfaction decreed to him, for reparation of that injury or damage; and if that action would lie, where the injury or damage arises from petty delinquencies, it cannot but appear very extraordinary, if the atrocity of the injury, or the greatest criminal malignity of the person who commits the same, shall afford a defence against that reparation, which undoubtedly would be due, was the injury less atrocious or criminal.

From every crime, whereby third parties are injured in their persons or properties, there arises a *duplex actio*; neither of which destroys the other; the one criminal, *ad vindictam publicam*; the other civil, at the suit of the private party injured, or those who come in his place, for reparation of the damages sustained. And if murder, which is the highest injury one can receive, attended with damages, in most cases, so great, as to be incapable of any adequate reparation, is to be allowed as an exception from that general rule, it is the only exception known in the law.

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If one wilfully sets fire to his neighbour's house, or robs him upon the highway, he may be prosecuted criminally, *ad vindictam publicam*; but that the satisfying public justice should deprive the party injured of their just claim for reparation of the injury or damage sustained by them, sounds extremely odd.

The doctrine of the Civil law is express upon this point. Matthæus, in particular, in his title, *De damno injuria data*, establishes the general rule, and proves it by many authorities, both of the texts of the law, and of lawyers of the first character, That in all cases, without exception, where a party suffers an injury or damage, *dolo vel culpa* of another person, action lies at common law for reparation; *delinquendo contraxisse videtur*; and which, in the title *De fidei-juribus*, he explains thus: "Ex quocunque crimine publico et accusationem oriri, et actionem pecuniariam in id quod interest."

So the rule is laid down in l. 7. § 1. *Pand. De injur. &c.*; where, after stating the question, Whether, in the case of murder, the party injured should be allowed to prejudicate the *publicum judicium* by the *privatum*? Ulpian answers the question in these words: "Ex quibus causis publica sunt judicia, ex his causis non esse nos prohibendos, quo minus et privato agamus."

And Matthæus, in the same title *De fidei-juribus*, § 11. explains the nature of those damages, which, in the case of murder, the wife, and nearest of kin of the murdered person, are, by the laws and practice of nations, intitled to claim *actione in factum*. His words are, "In factum actio moribus comparata est, quæ datur conjugi superstiti, heredibus, liberis," &c.; and then proceeds to state the several matters which properly enter into consideration, in ascertaining the *quantum* of that damage. And as the petitioner has not pretended to produce one contradictory authority, either from the texts or doctors of the Civil law, or from the writers upon the public law, or from the laws and practice of modern nations, the respondents will be allowed to consider it as a general and universal rule, That from every crime whereby third parties are injured in their persons, fame, or property, there arises a civil action or claim for reparation.

The action of assythment, by the law of Scotland, corresponds to the *privatum iudicium* by the Civil law, and to the action *ex facto* by the laws and practice of modern nations. And upon that supposition, the respondents will now proceed again to bring under your Lordships eye the repeated authorities formerly stated, both from the statute law of this realm, and from lawyers of the first character, for proof of this general proposition, That the action of assythment, allowed to the party injured, or to his nearest of kin, in the case of murder, or other crimes, whereby third parties are injured, is, in the construction of law, a claim of damages, in satisfaction of the injury; and though arising *ex delicto*, is no part of the punishment of the crime itself *ad vindictam*. And in examining these, your Lordships will particularly carry it along in your eye, that the reparation thereby decreed, under the word assythment, is not confined to the crime of murder, but equally respects every other offence, greater or lesser, whereby third parties sustain an injury and damage.

Thus it is, that by statute 1424, cap. 33. it is ordered, That the party convict before the justices of stealing, or destroying green wood, shall pay an unlaw to the King, and assyth the party skaithed.—By the act 1424, cap. 46. it is enacted, That where the King gives remission to any man, with condition to assyth the party skaithed, if the parties cannot concord be themselves, there be chosen good men, and leal sworn thereto, to modify amends after the quality and quantity of the person, and of the skaith.—By the act 1425, cap. 51. besides the punishment due to the public for breach of the King's peace, if done of forethought felony, it is statuted, That the justices, sheriffs, and other officers of the law, shall garr the party hurt be fully assythed, after the quantity of the skaith that he has sustained.—1426, cap. 95. re-enacts the same thing in case of forethought felony, and appoints the officers of the law to cause amends to be made, after the quantity of the trespass done to the party.—By the statute 1457, cap. 74. the party taking to a remission for spuilzie, theft, or reiff, is ordained to find caution to content the party complaining within forty days.—By the statute 1528, cap. 7. the same rule is established with respect to all

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other crimes, (except murder and mutilation, which, as the law then stood, the sovereign could not pardon), viz. That for all other crimes remitted by the sovereign, caution should be found to *assyth* the party injured; and that action for obtaining such assythment should be competent and privileged before the Lords of Council.—By the statute 1584, cap. 136, which respects equally slaughters, fire-raising, and other odious crimes, the King came under a solemn engagement, *in verbo principis*, not to grant remissions for any of said crimes that should be committed for the space of three years thereafter; and if any remission should be granted for such crimes of a prior date, that it shall be expressed therein, *that his Highness and treasurer have seen where the party is assythed*, otherwise the remission to be of none avail.—The same thing was re-enacted, under the like exception, for a further term of years, by the statute 1592, cap. 117.

From the uniform tenor of these statutes, and many others to the same purpose, the respondents may fairly conclude, that by the sense and understanding of the legislature, the *assythment* decreed to be made to the party injured, or those claiming in his right, *in case of murder, fire-raising, and other more enormous crimes, as well as in the lesser delicts*, was intended and understood to be a pecuniary reparation, in satisfaction of the injury and damages, in some cases capable of a precise estimation, in others not. With what justice or propriety, then, it is said in the petition, *to be rearing too great a fabric upon so slender a foundation*, to argue from the clear and express words of such a series of statutes, for explaining the nature of the assythment allowed of in these cases, is humbly submitted.

But, in confirmation of these, the respondents do further appeal to the authorities and opinions of lawyers of the first character, both ancient and modern, importing, that assythment denotes a pecuniary reparation to the private party, for the injury and damages done him.

And to begin with the *Quon. attach. cap. 69.* the title of which is precisely applicable to the case in hand, "*Licet curiæ in causa criminali*"

"nihil taxare damnum partis." And in the text itself, the rule is thus laid down: "*Si quis dicat contra aliquem quod combussisset domum suam, vel interfecerit aliquem de progenie sua, et in appellatione dicat quod damnum ei fecit inestimabile, taxabitur per viros fide dignos, curia rationabile damnum, quod appellans recepit de monte fuit amici."*

To the same purpose, Balfour, treating of assythment for slaughters, fol. 516, cap. 1, explains the matter thus:—"Be the law and consuetude of this realm, the assythment or kin-boot, made or adjudged to be paid by the committers of slaughter to the kins, bairns, and friends, is given to them in contentation of the hurt, damage, or skaith, sustained be them, through the wanting of the person that is slain, and for skaith incurred be them therethrough;" and for pacifying their rancour.

Lord Stair, book 1. tit. 9. § 7. gives the same explanation of the matter. His words are, "*Assythment, as it signifies the reparation made, so it insinuates the obligation to repair the damages sustained by slaughter, or other injuries; but it is chiefly pursued by the wife, or bairns, or nearest of kin of parties slain; and though the private party's interest be only for reparation of damage and loss, yet our custom applieth much of that which is penal therein to the injured.*"

Such also is the language of Sir George Mackenzie, in his *Criminals*, tit. *Remissions*, § 3. "*Albeit his Majesty may remit what injury is committed against him, yet he cannot prejudice thereby the interest of third parties. This satisfaction is by the civilians, called reparatio damnorum; by us, an assythment: and the obtainer of the remission must find caution to refund the party injured of all his damage and interest.*"

Lord Bankton, book 1. tit. 10. § 15. treating of assythment, defines it thus: "*A consideration given to repair the damage sustained by death, mutilation, &c.*" And throughout the whole remainder of that title, where he treats of the like assythment for theft, robbery, &c. he concurs in opinion with the other authorities above stated, that
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by the word *assythment* is understood, not the punishment of the crime, but the reparation due to the private party, for the injury and damage he has sustained.

And as in the crimes of *fire-raising*, *robbery*, *spuilzie*, and others of the like nature, attended with a certain *patrimonial* damage, the *assythment* *quoad* these cannot be considered as the punishment of the crime, but as *debitum justitie* to the party injured; it is to the respondents inconceivable, how the word *assythment*, applied to different crimes in one and the same statute, and by the same uniform expression, can intend such opposite things, as, in the case of murder, to signify part of the punishment of the crime, and in all the others, a pecuniary satisfaction to the private party, for reparation of the injury and damage he has sustained.

Having thus endeavoured to establish those principles of law and justice upon which the present action is founded, the respondents will now proceed to the more particular consideration of the very ingenious arguments that have been pleaded in support of the contrary proposition, assumed by the petitioner.

The argument is introduced with an observation, which, the petitioner says, must be *obvious* to every person who reflects on the origin of society and of nations, viz. That in the remote and barbarous ages, criminal judicatures would gain footing *much later* than other institutions necessary for the subsistence of society, when there was no established or regular system of punishment, but that every person was the avenger of his own wrong.

To what period of time, or ages of the world, the petitioner means to refer for this imaginary state of supposed barbarity, the respondents are at a loss to conceive. That particular nations, even after being once civilized, and brought under some system of government, may have relapsed into a state of barbarity, as was the case of some of the more northern nations, and that some nations in the remoter parts of the world may remain at this day in such state of barbarity, the respondents shall not dispute; but that mankind in general, since the creation to this day, ever were in such a state of universal

universal barbarism as the petitioner supposes, the respondents can by no means agree.

The origin of particular nations is involved in obscurity; nor does history inform of any people, amongst whom government and jurisdiction, criminal as well as civil, were not established in some degree; and as crimes are, in their nature, most offensive to society, especially those of an enormous kind, it is reasonable to think, that the suppression and punishment of these would be the first and principal object of attention, for the protection and security of those living in the same society, in their persons and properties, against the violence and injuries of their fellow-subjects.

In the earliest ages of the world, before mankind came to separate and divide into different states and nations, the sovereign power, both for punishment of crimes, and administration of justice, rested in the *pater familias*, who had the power even of life and death over those of his own family; and it was this power, which, upon the junction of more families into civil societies, whereby nations and states were formed, was transferred to the sovereign of each respective state.

Was it a supposable case, in this advanced state of the world, that either from the want of government, or from the defect of power, criminals could not be brought to justice, the respondents shall not dispute how far, *in such case*, it would be allowable for the party injured to take amends at his own hand, where justice could not be otherwise procured.

Such is the law at this day between nations independent of one another; but that persons living in the same society, and under the same government, should, at any period of time, have been authorised *sibi jus dicere*, and, at their own hands, to take amends for supposed wrongs and injuries, is inconsistent with every idea of government and society.

It is believed, no nation of the world was ever guilty of greater excesses in this respect than the subjects of Scotland, where the noble families were engaged in constant civil wars upon every trivial matter.

ter. The hands of government were then too weak, either to repress or punish such disorders. The fault did not lie in the defect of the law, but in the want of power; and, so far as the respondents can discover, it never was the law of Scotland, at any one period, that parties should be at liberty to do themselves justice upon their fellow-subjects, for redress of wrongs real or imaginary. No lawyer, to the respondents known, has said so; and it will not be taken upon the petitioner's bare assertion.

Upon this hypothesis, however, does the petitioner raise his whole ideal superstructure, taking it for granted, that in those earlier ages of the world every person was the avenger of his own wrong. The gradual progress by which he supposes this power to have been wrested out of their hands, as civil societies and government came to be established, is fanciful to the greatest degree.—That the law, taking advantage of the *avarice* of mankind, deprived them of that dangerous privilege of revenging themselves, by *fixing stated compositions* to be paid by the offender to the party injured, for the most atrocious as well as the most trifling crimes, under the several denominations of *croo*, *galnes*, *vergelt*, *kelchyn*, *enach*, &c.; and that, as *this method* of redeeming guilt by a pecuniary ransom was unsuitable to the idea of the punishment due to crimes, and gave a manifest advantage to the rich over the poor, these last not having the means to redeem themselves, government by degrees assumed the power, both of inflicting the punishment due to the crime, without respect of persons, as also to dispense with the punishment, where the circumstances of the case pleaded for mercy; and that as this dispensing power would, in its origin, be viewed with a jealous eye by those barbarous nations who still relished the idea of being their own avengers, the dispensing power in the hands of the sovereign was qualified with the condition of the assythment being made to the private party injured; and that, as this assythment was in its origin a *folatium* or peace-offering, to appease the rancour of the injured party, it so far retains its original nature, as to be part of the punishment inflicted upon the guilty person, exigible only where the sove-

reign interposes his dispensing power, in remitting the capital punishment due to the crime itself, as appears from the tenor of the letters of *Slains*, in use to be granted by the party injured, or by his nearest of kin, in the case of murder.

This, if the respondents mistake it not, is a fair state of the petitioner's whole argument upon this point; but as the hypothesis upon which it proceeds has already been shown to be void of all foundation, the respondents take the liberty to deny all and each of the consequential arguments raised upon it; and more particularly, that at any one period, this privilege of redeeming such atrocious crimes as murder, and others of the like nature, was acknowledged in the law of Scotland, or in any other state or nation, where a regular system of laws and government obtained.

What may be the just import and meaning of these barbarous words, scattered and dispersed in the books of the *Majesty*, is at best matter of conjecture; that they are not synonymous, as signifying one and the same thing, will be obvious from comparing the different passages. But allowing, for argument's sake, that all and each of them import a pecuniary satisfaction, in whole or in part, to the party injured, the respondents deny the consequence, that they are therefore to be considered as a ransom of the crime, or as part of the punishment, exigible only in the case where the sovereign interposed, by granting a remission.—No such thing is to be found in the texts themselves; nor has any lawyer, to the respondents known, advanced so absurd a doctrine.

From the general principles and rules of law, as above established, it is clearly proved, that a suitable reparation for the injury and damage sustained by the commission of every crime, greater or lesser, is a *debitum justitie*, which no power on earth can dispense with. The sovereign, by his royal prerogative, may remit the punishment due to public justice, where the circumstances of the case are such as intitle to mercy: but this dispensing power can never go the length to preclude the party injured from demanding that reparation which is due for the injury and damage he has sustained. And when the

statute-

statute-laws of this country, from the earliest period down to this day, are examined, it will be found, that the punishment decreed against crimes, or the remission of these by the sovereign, are qualified with no such exception, but directly the contrary.

The oldest statutes extant are those of Malcolm II. In chap. 3. § 4. mention is made of criminals condemned to death, *de homine condemnato ad mortem*.—In chap. 11. of the Pleas of the Crown, which inferred a capital punishment, loss of life, and escheat of moveables.—In chap. 12. § 1. The crime of treason infers further, forfeiture of the real estate.—In chap. 13. and 14. All these criminals are expressly ordered to be punished with death. Nor in any of these most ancient laws is the smallest hint given, of the punishment being redeemable by a pecuniary composition.

The books of the *Majesty*, allowing, for argument's sake, these to make part of the law of Scotland, are full of authorities to the same purpose. And more particularly, in book 1. cap. 1. where the *placita corone* are distinguished from other crimes inferring capital punishment, the crime of murder is specially mentioned as one of those crimes whereof the punishment is death, without the most distant insinuation of any of these atrocious crimes being ransomable.

The same principles are to be found in the *Quon. attach.* dispersed in a variety of places, particularly chap. 12. 18. 19. 75. and 77. and which are uniformly carried down in all our subsequent statutes.

And if conjectures are allowable, of what may have been intended by those passages in the books of the *Majesty*, where mention is made of the *croo*, *kelchyn*, *enach*, &c. as the price of blood, and satisfaction of injuries, it is rational to think, that it was not the ransom of the blood of the guilty person from the capital punishment that was thereby intended, but an adequate satisfaction, or ascertainment of the damages as due, either to the state, for the loss it sustained by being deprived of a subject, or to the private parties, for the injury and damage they sustained by the commission of the crime. The rationality of this conjecture will be obvious, upon considering the several articles in book 4. cap. 40. which ascertains the *quantum* of

the composition payable by the guilty person, in each of the offences therein enumerated, where, from the nature of the offence, it was impossible to ascertain with precision the real damage that the injured party sustained, such as murder, detemperation, broken bones, wounds, strokes, and other assaults upon the person, the quantum of which damage was thereby rated higher or lower according to the degree of the injury; but from thence to infer, that these were intended as a pecuniary ransom from the punishment of the crime due to public justice, is, with all due deference, a most groundless conceit, unsupported by any authority.

The limitation imposed by the several statutes in that behalf made upon the royal prerogative, in granting remissions for murder, and other such like odious crimes, without a proper satisfaction or assythment made to the party injured, is quite consistent with the principles already laid down, as supposing the assythment due to the party injured to be a *debitum justitie*, which the sovereign had no power to remit. Experience had proved the fatal consequences arising from the licentiousness of those barbarous times, when parties injured, instead of applying to government for redress of their wrongs, took revenge at their own hands; in which no proportion could be observed in commensurating the reparation to the injury received, where the party being judge in his own cause, would take such amends as gain and resentment prompted him to; and as the hands of government were then too weak to suppress the commotions thereby established, it was a prudent measure, for the peace of the country, and security of the lieges, so to qualify the King's power of remission of crimes, that it should be an express condition of the parties being assythed; manifestly supposing the claim of assythment, for a suitable reparation of the injury and damage sustained, to be so much a *debitum justitie*, that no pardon ought to be granted where such a satisfaction was not already made.

Accordingly we find, that in the statute of David II. cap. 44. the same is so limited, as to be void and null, unless satisfaction was made to the party injured. The title of the law is, *De remissionibus*

criminum

crimen per regem concessio; and the enacting words are, "Item statutum est, quod remissiones regis, concessae vel concedendae pro quibuscunque transgressionibus, sint casae et nullae, nisi satisfiat, *partim infra annum a data earundem*."

This prerogative, in the case of murder, was subjected to this further limitation by cap. 13. that where the murder was committed by forethought felony, *ex praecogitata malitia*, the sovereign should grant no remission, *nisi tantum ex concilii generalis deliberatione communi*, (that is, by consent of parliament), *si eis visum fuerit pro communi utilitate expedientius faciendum*.

And in book 3. of the *Majesty*, cap. 17. this power of remission, in the case of murder, is qualified with this further condition, that it be granted *per concilium et assensum progeniei illius sic occisi*.

And in conformity to these, all the after statutes, from the reign of James II. downwards, make it an express condition of remission granted by the sovereign, not only in the case of murder, but of other odious crimes, that the same shall be ineffectual to stop the course of justice, in inflicting the capital punishment, unless satisfaction has been made to the party injured, or nearest of kin.

This was not, properly speaking, so much a limitation of the prerogative royal, as to obviate a doubt which might possibly be entertained, whether the pardon of the crime did not, by necessary consequence, avoid every consequential claim arising therefrom: And therefore the respondents will be allowed to consider these repeated declarations of the legislature, touching the import and effect of the royal pardon, as so many express acknowledgements, of the justice and equity of that claim competent to the nearest of kin, on the part of the person murdered, to have a suitable satisfaction for the injury and damage thereby sustained; and by no means a ransom from the punishment due to public justice, or as only exigible where a remission is actually granted.

There is no other difference in this respect between murder and other atrocious crimes, such as fire-raising, robbery, &c. but that the damage sustained by the party injured, is, in one case, more capable

pable of a precise liquidation than in the other: the principle is the same in both, and the claim of assythment is equally founded in both.

The last authority that shall be mentioned upon this point, and which, in the respondents apprehension, is *per se* decisive against the doctrine contended for by the petitioner, is the act 1661, cap. 22. intitled, *Concerning the several degrees of casual homicide*, whereby, in the cases of casual homicide, or homicide in self-defence, thereby excused from capital punishment, it is *in terminis* enacted, that the person who has committed the murder shall be fined in his means, to the use of the defunct's wife and bairns, and nearest of kin; manifestly inconsistent with the supposal, that the assythment due to the relations of the murdered person is the ransom of the punishment of the crime, or exigible only in the case of a remission: And the fallacy of the petitioner's whole argument consists in assuming the exceptions from the rule, as the rule itself. The rule is, generally, That from all crimes, whereby an injury or damage is done to third parties, an assythment or reparation is due; and the only exception from that rule is, where the party injured, or nearest of kin, have consented to the remission, by granting letters of *Slains*, or otherwise.

And this cannot be better illustrated than from the tenor of these letters of *Slains*, as referred to in the petition; whereby the nearest of kin, of the party murdered, not only declare their oblivion and forgiveness of the injury itself, and all rancour, revenge, resentment, &c. on that account, but more particularly discharge him of all action civil, competent against him, or his estate and goods, on that account: The only action civil, competent to the private party, in such a case, is the action of assythment or damages.

It is therefore improper to consider this as a double punishment for the same offence; the *publicum judicium* concurs with the *privatum judicium*; the one *ad vindictam*, for satisfying public justice; the other *ad interesse* of the party injured; and though this last arises *ex delicto, et ex quasi contractu, quia delinquendo contraxisse videtur*, it is a

consequence

consequence of the crime, but no part of the punishment: And therefore, as the petitioner stands now convicted by sentence of a competent court, of having committed this murder, though by the peculiarity of the martial law he has escaped the capital punishment, there is neither justice nor reason, that he should reap this *fur-*
ther advantage, to the prejudice of third parties, of being thereby excused from making a just satisfaction to them for the injury and damages they thereby sustained.

The petitioner says, That cases may be figured, where the life of the person murdered was rather a burden than an advantage to his friends and family; and therefore, that in such case, if the assythment was intended as the reparation of a patrimonial loss, none such would be acclamable: in the supposed case, the defence would be relevant, That the family was rather benefited than hurt by the death of their relation; which therefore must be admissible to proof.

Was this proposition to be allowed, it would say nothing to the present case, where it is not alledged that the unfortunate young man was in such circumstances, as that any benefit or advantage could accrue to his family from his untimely death. Most general rules will, no doubt, admit of particular exceptions; but in the case of murder, the law, *ex eo quod plerumque fit*, presumes, *et statuit super presumpso*, that an injury or damage is sustained by the nearest of kin of the murdered person: They lose their relation himself, with all the *hopes, and comfort, and prospects*, connected with him; and for that injury and damage, it decrees a suitable reparation shall be made, subject to the modification of the judge, as to the *quantum* of the assythment, according to the circumstances of parties.

Whether this assythment is due by the peculiar law of Scotland, in the case of murder, where the capital punishment is inflicted, is a speculative question, unnecessary to be here argued, as it does not apply to the case; and though some lawyers have held it to be law, the respondents will be pardoned to doubt, if it is founded in the principles, either of law, justice, or reason. But supposing it to be law, and, as such, to be another exception from the general rule
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(if conjectures may be allowed) upon which it is founded, it is reasonable to think that it was *in favorem fisci*, upon the same principle that denunciation for a civil debt carried the escheat of moveables, exclusive of the debt upon which the denunciation had followed, till that was remedied by express statute, burdening the escheat with payment of the debt upon which it had fallen. Every capital punishment carries with it the escheat of moveables; and as these were the proper funds out of which the assythment to the injured party fell to be made good, the *favor fisci*, in those earlier periods of the law, may have been too powerful, in competition with the more just and equitable claim of the nearest of kin, acknowledged in every period of the law, by so many repeated statutes, limiting the sovereign's power of granting remissions, without such assythment or reparation be made to the party injured.

If Captain Macharg had received no more than the nine wounds which were not judged to be mortal, and had thereby escaped with life, it is a clear case, that he, or his nearest of kin, as in his place, must have been intitled to a suitable assythment for the injury and damages thereby sustained, independent of the punishment due to public justice for the assault and breach of the peace; and upon that supposition, how absurd must it appear, that the aggravation of the injury, by the *addition* of two mortal wounds, which bereaved him of his life, should operate an *absolvitor* to the guilty person from that assythment which would have been due, had Captain Macharg escaped with life; especially where, as in this case, the capital punishment was not inflicted, and consequently no forfeiture, either of the single or liferent escheat, and consequently no deficiency of funds out of which the assythment can be made good?

The petitioner further observes, That cases must have occurred, where persons convicted of capital crimes have escaped the punishment, either by breach of prison or by death before execution of the sentence; in either of which cases, the action for assythment was competent, if considered as a civil debt: but as no instance is to be found, where such action was brought in any of the supposed cases, the inference from thence drawn is, that it must have been general-

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ly understood, that no claim for assythment was in such case due; and which he considers as a further confirmation of the proposition formerly assumed, viz. That the assythment is but an accessory to the remission of the crime, and consequently not exigible where no pardon is granted, or where the criminal escapes the punishment by any other means.

It is easy to account, why few or no examples have occurred of processes for assythment being brought, where the guilty person escaped the punishment by death.—The intermediate space between the sentence of condemnation and execution is in most cases so short, that there is not sufficiency of time for processes of that nature; *et actiones penales non transeunt in heredes*: and the examples of criminals escaping by breach of prison are so rare, that no conclusion can be drawn from it; besides that in most cases the persons convicted of such enormous crimes, are in such low rank and mean circumstances, that they have not wherewithal to make a pecuniary satisfaction for the injury and damages.

And therefore, to conclude upon this point, the respondents submit it to your Lordships, that as the claim of assythment, though arising *ex delicto*, is a *debitum justitiæ*, for reparation of the injury and damage which the private party sustains, it can, with no propriety, be considered, either as the ransom of the punishment due to public justice, nor as depending upon the sovereign's remission; and more particularly, that as in this case no capital punishment has been inflicted, the petitioner is bound, by every principle of law and justice, to make a proper satisfaction for the injury and damage sustained by the murder which he is proved to have committed.

And this leads to the *second* defence now insisted upon, importing, That neither the proof taken upon the trial, nor the sentence thereupon pronounced, can be received, or admitted as a proper foundation, upon which your Lordships can proceed to judgement upon the claim of assythment; and that supposing that claim to be, in other respects, well founded, and the proper subject of a civil process,

it is essentially requisite, that the fact should be established upon evidence adduced in this process.

The respondents, for answer, say, That as the court-martial, though acting in foreign parts in the trial of a British subject, derived its force and authority from the laws and constitution in this country, their proceedings, and the judgements by them pronounced, must be of equal force as the proceedings and sentence of any other court of criminal jurisdiction in this country would have been: And as a sentence absolvitor of that court-martial would undoubtedly have protected the petitioner from any after trial for the same crime in the courts of this country, no reason can be assigned, why a sentence absolvitor should operate more strongly in point of jurisdiction and authority, than a conviction, and sentence condemnator.

It is a clear case, from the several statutes above referred to, respecting the King's remission, that the claim of assythment may be prosecute as an action of debt before any competent court having jurisdiction in such matters,—the court of session, the sheriffs, or other judges ordinary. And as it has been already demonstrated, that this claim for assythment is independent of the remission, as the conviction before the proper criminal court establishes the guilt of the crime against the party convicted, from which the claim of damages arises, the one springing out of the other, it is the sentence of conviction which founds the claim of assythment; and it is much doubted, if your Lordships would sustain a claim of this kind, founded upon an alledged murder, where there had been no previous trial and conviction of the crime itself. That is the mode prescribed by law for the trial and conviction of crimes of an atrocious nature: the trial must be *per pares*; no such mode of trial by juries is competent in the civil court; and therefore the sentence of the proper criminal court is *probatio probata* of the guilt or innocence of the party accused, upon which all the legal consequences must necessarily depend.

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In trials of falsehood originally brought before this court, the forgery being proved, and it appearing to be of such a nature as to merit a remit to the court of justiciary, the sentence of this court is *probatio probata* of the falsehood; whereupon the court of justiciary proceed to sentence, upon no other evidence of the crime but the judgement of this court; upon the credit and authority of which, the jury must return their verdict, finding the pannel guilty. And upon the same principle, the respondents do humbly maintain, that as the crime of murder is only cognoscible in the criminal court, and as the claim of assythment is grafted upon the sentence of condemnation in that court, your Lordships, in judging of that claim, can require or receive no other evidence of the guilt than the sentence of condemnation.

The same principle prevails in many similar cases.—Marriage and legitimacy must be tried, in the first instance, before the consistorial court; and according as judgement is there given, the one way or the other, *habetur pro veritate*, where that sentence is not brought under review by a court of superior jurisdiction.

This might be illustrated by manifold examples; one shall suffice:

—If a woman, having obtained declarator of marriage, should bring an action of aliment against her husband; or if a child, who has obtained declarator of legitimacy, should bring the similar action for asserting his birthright, and produce, for evidence of these, the decrees of the competent courts for trial of these matters; what for a defence would it be, That your Lordships could pay no regard either to the proof upon which these decrees proceeded, or to the decrees themselves? The answer would be obvious, That the facts upon which those consequential actions were founded being established by sentences of the proper court, *habetur pro veritate*; and your Lordships will be bound to proceed upon them as such.

The decrees of foreign courts can receive no execution, either direct or consequential, but by interposition of the authority of the judges of this country; which being only due *ex comitate*, intitles them to examine the justice of that foreign decree, before they in-

terpose their authority thereto. But decrees or sentences of the proper court of this country stand upon a different footing. The criminal judge must pronounce that judgement which, upon conviction, the law awards for crimes of that nature; the claim of damages arising *ex delicto*, actionable before the civil court, is not *ex comitate*, but *ex justitia*; and it founds oddly, that the court of civil jurisdiction, in awarding damages consequential of the conviction of the crime, should be at liberty to disregard that decree on which the criminal has been sentenced and punished, in every question of civil right arising from that conviction.

But allowing, for argument's sake, that your Lordships were as much at liberty in the one case as in the other, the rule established in the case of *Edwards contra Prescot*, 29th December 1720, respecting a decree of the court of King's-bench in England, was, That execution ought to pass upon said decree, unless something competent in law should be objected against it. This rule has been followed in several other cases; and were your Lordships to assume that rule in the present case, it would not avail the petitioner, as no possible objection can lie either to the form or relevancy of the indictment, to the proof of the crime, or to the sentence itself.

The case of *Mildovan* in 1739, again appealed to on the part of the petitioner, where the court found, That the verdict of the jury in the trial before the court of justiciary, convicting the pannel of theft, was not *probatio probata* in the action of damages before the civil court, and therefore that it was still competent to object to that proof, is but a single decision, attended with so many specialities, that it ought not to be made a precedent of. The verdict of the jury was inconsistent and contradictory; as, at the same time that it found the pannel guilty of the theft, it found his *alibi* proved by two witnesses; one of the capital witnesses in the criminal trial had, in the intermediate space between that and the civil action, been declared infamous and infestable. But, notwithstanding all these specialities, your Lordships did not reject the proof adduced in the criminal

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nal trial; all that was there found, was, that it was still competent to object thereto. At the same time, they must again recall to your Lordships remembrance, the judgement that was given in the case of Wilson *contra* Brunton and Chalmers in 1756. Wilson having recovered a decree in the court of King's-bench against Brunton and Chalmers, for L. 60 of costs, brought his action before your Lordships for making that decree effectual. Your Lordships, it is true, refused to give execution upon that decree; but Wilson having taken his appeal, the house of Lords reversed your Lordships decree, and decreed execution to pass; a judgement of the highest authority in point to the general argument.

And therefore, to conclude upon this point, the respondents submit to your Lordships, that as no exception is, or can be taken, either to the form of the trial, proof of the crime, or sentence thereupon pronounced, the judgement of that court must be regarded as a legal conviction of the crime charged; and that the claim of assythment does necessarily arise therefrom.

The petitioner concludes with some critical observations upon the words of the judgement itself, which he is pleased to understand, as not convicting him of the crime of murder, but of some lesser offence, merely because the capital punishment was not inflicted. But as the judgement itself lies before your Lordships, which, in so many words, certifies it to have been the opinion of the court, *that he is guilty of the crime laid to his charge*; so it expresses the reason why the capital punishment was not inflicted, viz. that there was not such a majority of voices for inflicting the capital punishment as the articles of war required. It would have inferred a nullity of the whole sentence, if, upon an indictment for murder, he had been convicted only of a misdemeanor, or other petty offence: but that is a point unnecessary to be argued, where the sentence is so clearly expressed, finding him guilty of the crime laid to his charge, that is, the crime of murder.

July

July 29, 1767. The Lords adhered, by a majority of eight to six, including the Lord President, who was in the minority. Afterwards L. 200 was decreed.

Mr. Lockhart, Mr. Henry Dundas, Ro. Campbell.

Mr. Abernethy appeared by counsel, and pleaded several defences. In the first, the pursuers produced the sentence of fugition in N^o 99. July 1767.

Mrs HARRIOT STUART, widow of John Leith of Leith-hall, and John, Alexander, and James Leiths, their children, and their tutors for their interest.

On this point, pronounced the following interdict, 12th June 1767. "In respect no objection is held against the form and process of

JAMES EARL FIFE, donatar to the escheat of James Abernethy of Mayen.

Assythment is exigible from a person accused of murder, who has been outlawed for not appearing, and standing trial.

ON the morning of 22d December 1763, John Leith of Leith-hall was killed by James Abernethy of Mayen, who immediately made his escape, and fled beyond seas. Criminal letters were raised and pursued against Mr Abernethy, at the instance of the Advocate, for his Majesty's interest, and of the widow and children of the deceased, before the circuit-court held at Aberdeen on the 19th May following; when Mr Abernethy failing to appear, sentence of fugitation was pronounced against him.

In pursuance of this sentence, letters of denunciation were issued, which were regularly executed, and recorded, with the executions, in the books of adjournal.

A gift of Mr Abernethy's single and liferent escheat was granted to James Earl Fife, expressly for the behoof of Mr Abernethy's widow and children, under the following proviso: "That the said

"gift shall be without prejudice to the right or claim which Mrs Harriot Leith, or her children, may have to an assythment, out of the

"the goods and estate of the said James Abernethy, for killing the said John Leith, her husband, and their father."

The widow and children of the deceased brought an action before the court of session against Mr Abernethy, concluding for L. 4000 Sterling of assythment.

Mr Abernethy appeared by counsel, and pleaded several defences. In bar of which the pursuers produced the sentence of fugitation, in consequence of which they contended he had no *persona standi in judicio*, and therefore could not be heard.

The Lord Ordinary, upon advising a memorial for the pursuers on this point, pronounced the following interlocutor, 12th June 1765.

"In respect no objection is pleaded against the form and process of denunciation, finds the said James Abernethy has no *persona standi*, and therefore is barred from pleading any defence in this action; reserving to the donatar of his escheat, or others having interest, to compare, and insist, that by the laws and practice of Scotland, an assythment does not take place, unless a pardon or remission is produced and pleaded on; and ordains the pursuers to give in a memorial upon that point, and to condescend on instances of assythment being found due where no pardon was obtained or pleaded on."

The pursuers preferred a representation against this interlocutor; upon which the Lord Ordinary took the case to report, and ordered the pursuers to give in a memorial.

The Lords, Dec. 4. 1765, "sifted further procedure in this cause, until the pursuers make the officers of state, and the donatars to the escheat, parties therein."

Upon this the pursuers brought an action against the officers of state and the Earl Fife, concluding as that against Mr Abernethy did. This was remitted to the other, and both again sent to the Ordinary; who, after a debate between the pursuers and the new party, again took the case to report, and ordered informations.

The defender pleaded, That an assythment could only be claimed, when, by the interposition of the sovereign, the murderer has been withdrawn

withdrawn from punishment; and the argument upon this point was much the same with that in the preceding case. The defender argued too, upon this point, That Mr Campbell's case, then in dependence by a reclaiming petition, was different from his: because in that case the murder was premeditated; but all the accusation against the defender was, that in the madness of a drunken quarrel he had the misfortune to kill his companion and his friend. *2dly*, Had Mr Campbell been tried in the common course of law, he must have been condemned to death; he escaped by the interposition of a temporary court, authorised by the King: so that the case was the same as if he had escaped by the interposition of the King himself. *3dly*, In Mr Campbell's case, the Lords seemed to be almost unanimously of opinion, that an assythment could not be claimed either when a capital punishment had been inflicted, or when the criminal had not been brought to trial. Mr Campbell was brought to trial, proof was brought of his guilt, and the sentence of the court-martial secures him from any after prosecution. But Mr Abernethy has not been brought to trial; no proof of his guilt has been brought; nor can the court take any; as thereby the witnesses that might be afterwards adduced before the criminal court, would be prejudicated.

The defender further maintained, That to find assythment due in this case would lead to many absurdities and inconsistencies. An assythment can only be claimed out of the effects of the murderer. A court of justice cannot proceed on supposition that a party has committed murder, without a clear proof; but none has been brought of Mr Abernethy's guilt, and he does not confess it. No proof of it can be taken in this case; because thereby the witnesses would be prejudicated: and it would be incongruous to allow a proof of the crime, which is the principal, in a process for an assythment, which is but the accessory. Besides, if an assythment be found due, and if afterwards Mr Abernethy shall be apprehended, and brought to trial, or shall voluntarily submit himself to trial, what inconsistencies may ensue? If he be found not guilty, he must be absolved by the criminal court, though he has been condemned by the civil court. If

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he be found guilty, he must suffer death, though he has paid a sum of money; which is unquestionably only due when the criminal escapes from capital punishment.

There is no sufficient ground for presuming Mr Abernethy's guilt. The *squalor carceris*, the expence of a criminal trial, the want of evidence to prove the truth, and many other circumstances, may prompt the most innocent man rather to abscond than submit to trial. *Flight*, therefore, ought not to be held a sufficient presumption of guilt; *Voet. Comm. ad tit. De probat. § 5.* The case of him who obtains a remission is very different; as it would be perfectly absurd to accept a pardon for a crime which had not been committed.

As to the sentence of fugitation, that proceeded not upon a presumption of his guilt, but "for his *contempt and disobedience* in not "compearing."

The answer on the general point was much the same with that for *Macharg* in the preceding case. As to the particular circumstances of this case, the pursuers argued, That since acceptance of a remission before conviction is admitted to be such an acknowledgement of guilt as subjects the acceptor to an assythment, that shows, presumption without proof is sufficient; as also, that flight ought to be held a sufficient presumption; because there is surely less reason for believing him guilty who stays, and obtains a remission, than him who will neither trust to the mercy of his sovereign, nor to the judgement of his peers upon a fair trial, but flees, and suffers a sentence of outlawry to be pronounced against him, the consequence of which is, an absolute forfeiture of his moveable estate, and of his land-estate for his life. The *squalor carceris*, and all the other circumstances which the defender says may prompt an innocent man to flee, may prompt him also to apply for a remission.

But if the court does not think presumptions sufficient, the pursuers are willing to undertake a proof of the murder; and this proof is undoubtedly competent.—See the argument in the preceding case.

The inconveniencies to which such proof, it is said, would give rise,

are groundless and imaginary. No proof taken in this case can militate against Mr Abernethy in a trial before the criminal court. As to prejudicating the witnesses, if, by that phrase, the defender means, that the witnesses may be twice examined, it is true; but what bad consequence can arise therefrom is inconceivable. It might as well be argued, that witnesses ought not to be precognosced. Actions for reparation are every day sued in this court by persons injured, upon facts which might be made the subject of a criminal prosecution at the Advocate's instance.

July 29. 1767. The Lords, by a scrimp majority, found no assythment due.

Upon a reclaiming petition and answers, the Lords found assythment due; and it was afterwards fixed at L. 200 Sterling.

Adv. Cosmo Gordon.

Alt. Ja. Ferguson.

N^o 100.

1770.

LEONARDO PISCATORE, musician in Edinburgh,

A G A I N S T

JOHN SIMPSON, coppersmith there.

Criminal process brought before an inferior judge must be tried by a jury, if it conclude for a corporal punishment.

SHERIFFS, justices of the peace, and other inferior magistrates, have been long in the practice of trying offences not capital without a jury, and inflicting the severe arbitrary punishments of banishment, whipping, and the pillory, upon such persons as they found guilty. Their judgements in such cases may be brought under review either before the justiciary or session.

Some years ago one William Ruffel was brought to trial before the sheriff of Mid-Lothian for a theft, not capital, at the instance of the fiscal. He preferred a petition, praying to be tried by a jury. That the

the sheriff refused. He preferred a second petition, repeating his demand. That the sheriff refused, *in respect of the practice*. Upon this he offered a bill of advocacy to the court of session; but the Lord Ordinary refused it. His counsel intended a reclaiming bill, but was prevented by Russel's having the good fortune to escape from prison. How the Lords of Session would have determined at that time, had the case been brought before them, I cannot pretend to conjecture. The sufficiency of the sheriff's *ratio decidendi* may be doubted: for though inferior judges and magistrates have been in the immemorial practice of trying crimes not capital without a jury; yet they have not, it is believed, been in the practice of refusing a jury-trial when demanded. The truth is, the demand has been seldom made.

This practice was most incongruous and improper: incongruous, because the justiciary, which is the supreme criminal court of the country, cannot inflict the smallest punishment without a previous conviction by a jury; improper, because it implies, either that the person of a British subject may be held very cheap, or that jury-trial is not a valuable privilege. Expediency may perhaps require, that inferior judges and magistrates should have the power of fining and imprisoning for petty offences, without the intervention of a jury; but to allow them to inflict corporal punishments, without a previous conviction by a jury, is quite inconsistent with the spirit of our constitution. It is therefore with great pleasure that I give an account of Piscatore's case, in which the justiciary pronounced a judgment disapproving of this practice.

John Simpson, a journeyman coppersmith, with concurrence of the fiscal, brought a criminal action before the sheriff of Mid-Lothian against Mr Piscatore, setting forth, That the defender had fired a gun or pistol at him, loaded with small shot, by which he was grievously wounded; and therefore concluding, That the defender should be decreed to pay L. 500 Sterling of damages, and for a cor-

poral punishment, by pillory, whipping, imprisonment, or otherwise.

Piscatore moved the sheriff for a jury-trial: but the sheriff found there was nothing in the complaint, nor in the conclusions thereof, that rendered a trial by jury necessary; and he afterwards refused a reclaiming petition, without answers.

Upon this Mr Piscatore preferred a bill of advocacy to the court of justiciary, in which he contended, That he was intitled to a jury-trial. At the same time he agreed that the trial should proceed before the sheriff without a jury, if the court would direct the sheriff to restrict the punishment to a pecuniary reparation.

Simpson put in an answer to the bill, agreeing to restrict the conclusions of his libel to a pecuniary reparation; but the court most properly laid hold of this opportunity to testify their disapprobation of the mode of trial intended by the sheriff, and pronounced the following judgement. "Having considered the said bill, and answers, with the criminal complaint before the sheriff, *find the libel referred to in the bill ought to have been tried by a jury*; and therefore remit the cause to the sheriff, with this instruction, *That he alter his interlocutors complained of, and dismiss the libel*; reserving to the pursuer to insist in a new libel before the sheriff, or any other competent court, as accords of the law." *

This judgement merits the highest applause; and will, it is hoped, put an end to such mode of trial for the future, excepting when special statutes authorise it; of these, it is much to be lamented, there are too many. Expediency, as before observed, may require, that inferior judges have the power of fining and imprisoning for petty offences; but to allow justices of the peace to

* Simpson afterwards brought another action before the sheriff against Mr Piscatore, concluding for damages only. The sheriff found the defender liable; upon which he appealed to the court of session, where the case still depends. I took the above account of the procedure before the justiciary upon the first process, from the printed papers in this last before the court of session.

whip publicly, without a previous conviction by a jury, (as many *British* statutes do), is a gross violation of the right and security of the subject. Many people do not know that there are such laws in our statute-book. Hence it is often asserted in conversation, and even in books, that no British subject can be convicted of a crime but by the verdict of his peers. The proposition is false; but it shews these laws are repugnant to the ideas and feelings of the nation.

N. B. In the course of the trial of Brown and Wilson for murder and other crimes, in summer 1773, the pannels objected to a witness offered on the part of the crown, That he had been found guilty of theft, and sentenced to be whipped for that crime by two justices. The court over-ruled the objection, being of opinion, that no man could be deprived of his good name by the sentence of an inferior court, unless it proceeded on a previous conviction by a jury.

ADDI-

A D D I T I O N S and N O T E S.

No 1. p. 1. *Case of Weirs.*

Several officers of the army, and other credible witnesses, deposed, that they heard the Major confess the bestiality and incest.—The last, too, was proved by the oath of Margaret Weir, his other sister, who swore she caught him and Jean in bed.

Jean Weir's declaration acknowledges the incest as libelled. It bears also, that she knew Margaret Bourdon, her brother's step-daughter, was with child in his house, and by him, as was generally believed and reported; and that the said Margaret did not deny it when she posed her on it. She confesses likewise all the forceries in the libel; and says further, that her brother had a mark, like the devil's mark, on his shoulder.

The abridger of the books of Adjournal, observes upon this case, “That he (the Major) kept a long staff, which he held always to his mouth when he prayed; which staff was taken with himself when he was taken out of his house in Edinburgh: and the manner of his discovery, does hold out much of the justice of God in the discovery and revealing of such sinners; for he having fallen sick in his old age, in a house where he lived alone in the West-bow of Edinburgh, where many professors of religion (zealots) lived about him, his neighbours were affrighted with the noise which they heard upon the night; and some of them having gone to see him, he declared to them, that he had great horrors of conscience, and was troubled with the appearances of the devil; which being discovered by some of the neighbours to the magistrates, they immediately caused examine and apprehend him, and bring him to his trial.” MS. Abst. iii. 20.

The Queen of Fairie, mentioned in Jean Weir's indictment, is probably the same sovereign with the *Queen of Elfland*, who makes a figure in the case of Alison Pearson, 15th May 1588; which I believe is the first of the kind in the record.

N^o 3. p. 5. *Case of ten witches.*

Indictments for witchcraft were always laid upon the law of God, and sometimes, particularly on the text in Levit. xiii. and Deut. xx. and act 73. parl. 9. Q. Mary. These indictments, the interlocutors on the relevancy of them, and the verdicts returned against the unhappy pannels, do no honour to human nature. In justice to the juries, however, it must be observed, that they sometimes brought off the pannels; but there are instances of their being tried before an assize of error for doing so. Even in those days, there were not wanting lawyers who exclaimed against the barbarity and absurdity of such prosecutions; but in vain. Sir George Mackenzie is at great pains (tit. *Witchcraft*) to refute one Wierus, who had written a treatise to undeceive mankind in this matter.

May 1591. Eufeme Macalzane, a Lord of Session's daughter, was tried for treasonable conspiracies by witchcraft; making the King's picture in wax, raising storms to hinder her Majesty coming from Denmark, &c. Lawyers argued for her; but the jury, though all considerable landed men, found her culpable and fyllit of nine points of dittay: upon which she was sentenced to be burnt quick at a stake, and all her estate, heritable as well as moveable, to be forfeited.—MS. Abst. i. 159. 160.

In the case of Elspeth Graham and Christian Wilson, Aug. 3. 1661, the Abst. ii. p. 6. 7. bears, "The only remarkable thing in this process is, that Christian Wilson, one of the pannels, having killed her brother by sorcery, and being suspected thereof by the minister, and others, she was brought in to touch his corpse. Upon seeing thereof, she prayed, that God, who made the sun to shine on their house, would bring the murder to light; and immediately thereafter, she touching the corpse, *it bled*, though it bled not before when touched by others. This, and the other points of the libel, proven by famous witnesses."—This circumstance was likewise *proved* against Sir Philip Stamford, condemned for the murder of his father. See Fountainhall, Dec. 4. 1688. But the prisoner insisted, the bleeding was owing to the moving the body, and an incision made by the surgeons, who had inspected it. See Trials for treason, &c. vol. 5. p. 498. Sir Kenelm Digby, in his *Observations on Religio Medici*, p. 324. takes it for granted, that a corpse does often bleed on such occasions; and pretends to account for the phenomenon. His words are, "And to this cause, peradventure, may be
" reduced

“ reduced the strange effect which is frequently seen in England, when, at
 “ the approach of the murderer, the slain body suddenly bleedeth afresh : for
 “ certainly the souls of them that are treacherously murdered by surprise, use
 “ to leave their bodies with extreme unwillingness, and with vehement indig-
 “ nation against them that force them to so unprovided and abhorred a pas-
 “ sage. That soul, then, to wreak its evil talent against the hated murderer,
 “ and to draw a just and desired revenge upon his head, would do all it can
 “ to manifest the author of the fact. To speak it cannot ; for in itself it want-
 “ eth organs of voice ; and those it is parted from are now grown too heavy,
 “ and are too benumbed, for it to give motion unto : yet some change it de-
 “ fireth to make in the body, which it hath so vehement inclinations to ; and
 “ therefore is the aptest for it to work upon. It must then endeavour to cause
 “ a motion in the subtlest and most fluid parts (and consequently the most
 “ moveable ones) of it. This can be nothing but the blood, which then be-
 “ ing violently moved, must needs gush out at those places where it findeth
 “ issues.”

In the case of Janet Ker, 20th Aug. 1661, the indictment, *inter alia*, charges, That after her threatenings, Henry Balfour contracted *the pains of a woman in child-bed*, with an universal swelling in his body, whereof he died. Abst. ii. p. 10.

In the case of Janet Cock, 10th September 1661, the eighth article of the indictment was, “ That she having conceived hatred against William Mitchell for smiting her, said, she would see him hanged, and make a shameful end ; and accordingly he was hanged at Dalkeith.” To this it was answered by her counsel, Mr Andrew Birnie, “ She might have done that by conjecture, such threatenings being usually made by persons injured ; and if any crime could be inferred from this, it is not sorcery, but that which the lawyers call *deuteroscopia*, which is not libelled.—MS. Abst. ii. p. 21.—*Deuteroscopia* seems to be Greek for the *second sight*.”

In the case of Margaret Hutchinson, (same year), Mr Birnie objects to her indictment as follows : “ That the article of indictment relative to Katharine Wardlaw was not relevant, because it does not condescend upon the means and methods of the sorcery and enchantments, as charms, syllabs, circles, and other ceremonies, whereby the devil does effectuate his purpose by his instruments ; which ought to be condescended on, because it cannot be denied, but the devil may immediately produce these effects by himself, and truly does it ; and they are not the natural product of sorceries and enchantments used by
 witched

witched creatures; *et in dubio* a distemper is to be ascribed to nature. And as to that woman's recovery, the indictment is no less irrelevant, the means of forcery whereby she recovered not being condescended on, [particularised]. 2do, *In veneficiis*, it is generally granted, that *una et eadem persona non potest esse saga ligans et solvens*; which two offices are always bestowed by the devil on distinct persons: 3tio, It is an undoubted ground in law, in the subject of witches, That *in commutationibus et translationibus semper lucratur demon*; and therefore the devil does never loose a disease from one, but by transmitting it, as from a person more significant, as from an elder to a younger, and from a beast to a man; whereas this libel bears the disease to have been translated from Katharine Wardlaw upon *her cat.*" MS. Abst. ii. 16.

I shall conclude this chapter of witches with a story which I had from several persons, so very well informed, that I have no doubt it is true. In one of the years of famine which distressed this country towards the close of the last century, a poor widow in East-Lothian, who had a numerous family, was committed to prison on suspicion of witchcraft. There was no other ground of suspicion, but that, while all her neighbours round were emaciated with hunger, she and her children were in good case. Upon her commitment she was tortured, as persons accused of that crime generally were; and confessed her having been at many meetings with the devil, and other absurdities. The celebrated Mr Fletcher of Salton hearing of this, repaired to the jail where she was, and told her, That he was certain her pretended confession was all a fiction; and assured her, if she would acknowledge it to be so, he would soon procure her release. The woman, however, persisted in accusing herself of impossibilities. Mr Fletcher replied, That it was in vain for her to attempt deceiving him; that he was fixed in his belief all such accusations were ridiculous; and that he was convinced her confession proceeded from a persuasion, that though she should be acquitted, yet she could never after live at home with credit or peace, and was therefore weary of life; but he again assured her, that if she would retract, and tell him the truth, he would not only obtain her liberty, but provide for her in another part of the country. This made an impression upon her; and she declared, That her confession was all a fiction, proceeding from the motive he had guessed; and that the good condition of her and her children was owing to their feeding upon snails; of which, she said, he might be satisfied, by examining her house, where he would find several barrels filled with them. Mr Fletcher had the curiosity to search her house, and found a great quantity of snails stored up accordingly. Upon

N^o 7. p. 8. *Case of Alexander and William Henrysons, 1694. Remit.*

In the case of David Doig, indicted at the instance of Andrew Straton minister of Finhaven, for defaming him, the court found, "That the cause is
" not of *that nature* as that needs to be discussed before the supreme court;
" and therefore deserts the diet, and leaves the pursuer to pursue before the
" inferior judge competent." MS. Abst. iii. 199.

Aug. 25. 1662, in the case of Thomson, indicted for theft at the instance of Alexander Bain, the justices, for their information, examined some of the witnesses upon oath, who deponed, they knew the cows libelled to have been in the possession of the pursuer; and that since they saw them in Stirling park, where the pannels live, and where one of them is a butcher, and the other a gardener; but knew nothing of the stealing of them. After these depositions, the justices-deputes found, That the cows libelled belonged to the pursuer; and decerned them to be delivered to him, or any having his power; and ordained "the provost and bailies of Stirling to take trial of the
" goods, if they were bought in a public market; which being proven, the
" justices affoilzie the defenders from any criminal pursuit; and ordains them
" to have action for the price of the goods, and their prejudice, as accords." The abridger remarks upon this case, "I have not observed any such interlo-
" cutor as this in the criminal registers, referring a point to be tried by others
" out of the court, and before report affoilzieing; nor wherein the judges
" themselves decerns in the point of right and restitution upon the testimonies
" of the witnesses." MS. Abst. ii. 71. 72.

N^o 11. p. 12. *Case of Aikenhead, 1696. Blasphemy.*

These expressions the indictment further charges, "He had wickedly ut-
" tered, in several companies, without *the least provocation*, but merely
" prompted by his irreligious and devilish *malice* against God and our blessed
" Saviour."

A French book, intitled, *Systeme de la nature*, published at London in the year 1773, maintains all the propositions for which Aiken died, in language still bolder, and very eloquent.—*Tempora mutantur!*—Those who write on the history of man, should be well read in criminal records.

Nov. 22. 1697, Patrick Kinninmonth of that Ilk was brought to trial for

Blasphemy and adultery. The last charge was passed from. The indictment alledged, He had affirmed Christ was a bastard; and that he had said, If any woman had God on the one hand, and Christ on the other, he would stow (cut) the lugs (ears) out of her head, in spite of them both, &c. He pleaded, chiefly, That he was drunk or mad when he uttered these expressions; if he did utter them. The court found the libel relevant to infer the pains libelled, i. e. death; "and found the defence, That the pannel was furious, or distracted in his wits, relevant; but repelled the alledgeance of fury or distraction arising from drunkenness." The prosecution was dropped.

N^o 14. p. 16. *Case of Murdoch, 1699. Adultery.*

An arbitrary punishment was inflicted on a man and a woman for this crime in 1757, at a circuit.—In May 1766, Mr Nisbet, a minister of the church of Scotland, was found guilty of adultery with a married woman after his own marriage; upon which the circuit-court at Inverness, where he was tried, sentenced him to be imprisoned for two months; during which time, he was to be fed on bread and water only, and afterwards to be transported to the plantations, and banished for life.—But there have been very few trials for adultery in this century: there were very many anciently.

April 9. 1565, Mr John Craigie parson of Kincardine, and Margaret Mowit, were indicted for adultery and incest, the said Margaret being spouse to John Craigie, brother's son to the said Mr John. The prolocutors for the pannels pleaded, That no process ought to be led in this court, because the said Margaret is lawful wife to the said Mr John, she having been divorced from the said John Craigie by a decret of two ministers, who had commission and power to try the said matter; and they produced the decree, bearing, "That the said Margaret was divorcit frae (from) the said Mr John Craigie, upon sufficient proof that the said John was *impotent frae his nativity*, and unable and incapable of mutual cohabitation with the said Margaret, as in marriage is requirit." The Advocate got a delay, that he might answer this alledgeance. MS. Abst. i. 59.

August 1. 1598, Alexander Hay of Dalgetie was indicted for notour adultery. He alledged, the act of Queen Mary, and the act 1581, were in desuetude, no person having been tried on either since they passed. The Advocate opposed the books of adjournal. He was remitted to an assize. After the assize was sworn, he protested, "That seeing there is nothing offered for verifying
" the

“the libel but the commissars decreet, no regard ought to be had to it; nor
 “are the assize to regard any proof but what is led in their own presence; and
 “the forms and effect of a civil action is very different from a criminal; and
 “a proof of carnal copulation may be sufficient in a question of divorce, but
 “no ways sufficient in a criminal process, in the crime of adultery, especially
 “in notour adultery, where many circumstances must be made appear besides
 “the simple act.” The Advocate made a long answer, endeavouring to shew
 the decreet was a sufficient proof. Six of the jury fylit him, nine assilized,
 [absolved]. MS. Abst. i. 181.

March 14. 1617, John Guthrie, Alexander Thomson, and Janet Cuthbert,
 were indicted; the first for bigamy, and adultery with a third woman; which
 last he confessed before the kirk-session, and did penance in sackcloth.—The o-
 ther for notour adultery; which he confessed also to the kirk-session, and did
 penance.—The last for living in adultery several years with a married man in
 her husband's lifetime.—They were all convicted; and, by his Majesty's sign-
 manual, the first was sentenced to be hanged, the other two banished. MS.
 Abst. i. 300.

March 23. 1631. Marion Alstane was indicted of adultery with John Morton,
 wherein she buire a lad-bairn, (i. e. bore a male child); which bairn she there-
 after murdered. She owned the adultery, but denied the murder; affirming
 it was chocket (suffocated) by accident. The jury found her guilty of the a-
 dultery, but innocent of the murder. However, she was sentenced to have her
 head struck off. MS. Abst. i. 337. The nature of the punishment indicates
 that the court thought her guilty of the murder too. See Introduction, p. xl.

In this case of Murdoch and Douglas, the Advocate strenuously
 maintained, That though we had no statute making simple adultery ca-
 pital, yet the judges ought to inflict the last punishment; because the crime
 was capital by the Common law and law of Moses; *l. 3. C. ad leg. Jul. de*
ad. &c.; Levit. xx. 10.; Deut. xxii. 22.; which was agreeable to the law
 of nature and moral law. However, after all, he restricted the libel.

In the case of Elliot and Maxwell, Jan. 25. 1694, “the Lords found the in-
 “dictment as to the simple adultery relevant to infer an arbitrary punishment;
 “and that there were bairns, one or more, procreate betwixt the pannels, or
 “that they were notour and manifest adulterers, likewise relevant to infer the
 “pains of death libelled.” Abridg.

N^o 15. p. 16. *Case of Carmichael, 1699. Murder.*

When one is indicted of slaughter, if it is committed of a sudden, it is so expressed in the dittay, in Latin, *subito commissi*; but if from forethought or design, it is said to be committed *ex veteri inimicitia et præcogitata feloniam*. MS. Abst. i. 45.

In the case of William Bickertoun, indicted, 15th December 1581, for using and wearing of pistols within three quarters of a mile of the King's person, and therewith shooting G. Auchinleck of Balmanno through the body, the assize found, "the pannel culpable, fylit, and convict, of the shooting G. Auchinleck of Balmanno with bendit pistol throu the body; but *acquitt him* of doing the same of *auld feid*, [vet. inim.], *sett purpose*, commission be way of unbesetting of the hie gate, or *forethought felonie*, or that the fact was committed within three quarters of a mile of the King's person." MS. Abst. i. 120.

N^o 17. p. 18. *Case of Drysdale and Tannahill, 1704. Incest.*

Lord Royston, in his MS. notes on Mackenzie, p. 82. after mentioning the interlocutor in this case, adds, "*Sed dubito an jure*; for since King James's act (which is the only one we have by which this crime is punished) has an express reference to the Judaical law, Levit. xviii. it ought not to be extended to other cases not therein expressly mentioned: and in Beatoune's case in 1692, who was indyted for committing incest with her aunt's husband, it was found relevant to infer an arbitrary punishment only. *Vide Hottom. Disp. de grad. cogn. et incert. nupt.* who explains this crime both from the Civil and Levitical law, learnedly and clearly."

In this case of Drysdale, the Advocate contended, That the degrees mentioned in Levit. xviii. are understood in our law to comprehend what he called the *equivalent*, or *like*, in proximity and affinity. Since the 16th verse expressly prohibits to use a brother's wife, it thence follows, that a wife's sister is equally prohibited, and punishable by death, being in the like degree of affinity; and so it hath been constantly observed in this kingdom since the act of parliament which was correctory in the beginning of our reformation, of two abuses; one of the Canonists in the Popish church, who extended the prohibit degrees beyond those mentioned in the word of God, in order to extend

tend their power of granting dispensations; the second, for correcting the laxness of casuists, derived from the Civil law and Heathen customs, who, tho' they condemned persons in affinity to be conjoined in copulation, which were judged to be in the place of parents and children; yet in the collateral line they took greater liberty; judging oft-times, that marriage being dissolved by death, the affinity and consequences thereof ceased. And accordingly, in the 1649, a table of prohibitive degrees was made out, as appears from the rescinded acts, which clears both our law and practice; and Jean Knox was hanged for committing incest with her husband's brother, May 1646, marked by Mackenzie in his Criminals: and the doctors are lax in this matter, particularly Carpz. par. 2. quæst. 72. which is evidently contrary to 1 Cor. chap. 5. *Replied*, However an argument may be drawn from Levit. xviii. 16. yet it is hard to subject the lieges to the pains of death in a case not expressly determined by statute, and which is controverted among lawyers. The act 1649 is rescinded; and the case of Jean Knox passed without any debate, or hearing of lawyers, upon her own confession, that she had to do with two brethren, by marrying one of them when she was with child to the other, whereby such a *confusio seminum* did happen, as justly subjected her to the ordinary punishment; Carpz. quæst. 74. N^o 26. *in fine*. Besides, the husband was not condemned, as he would have been if the said table, in the year 1649, had been in every thing explanatory of the law of nature: for it says, That the unlawful company of man and woman, as well as marriage, begets an affinity that subjects to the ordinary punishment in the case of transgression. So that it seems the wisdom of our nation has not thought fit to renew or authorize the said table. —Abridg.

N^o 19. p. 19. *Case of Pringle, 1705. Theft.*

Probably a mistake has been committed in recording this indictment, the transcriber having written *creditors* to the bank, instead of *cantioners* to the bank.

The case of Margaret Hartside, tried May 31. 1608, is very much akin to Pringle's. She was indicted for stealing a pearl worth L. 110 Sterling, with other pearls, jewels, and goldsmith-work, pertaining to the Queen's Majesty. —Assessors to the Justice, Balmerino, Abercorn, Linlithgow, and Sir Peter Young.

Obj.

Objection against Sir Peter, That he is his Majesty's domestic servant. — *Answer*. This was repelled in Cranstoun and Craigengelt's case, in Gowrie's conspiracy. — *Obj.* against the Earl of Linlithgow, That his spouse is of kin to the King. — *Ans.* Being of kin to the King is no cause of suspicion or declination. — *Obj.* against Balmerino, That his wife is fourths of kin to the Lord Advocate pursuer. — The Justice repelled the haill objections offered against the assessors.

It was pleaded in defence for the pannel, That she being her Majesty's servant, had the custody of the pearl and jewels alledged to have been stolen, and was willing to compt (account) for them. So the fact cannot amount to theft, she having lawfully attained the possession: "*Qui re sibi commodata vel apud se deposita usus est, furtum non committitur;*" *Cujac. ad l. Qui fundum ff. pro emptor.* And by her deposition produced, it appears, that she believed her Majesty would not demand them; and though in that she might be mistaken, yet a mistake can never make her guilty of theft: "*Nam affectus sine effectu non est furtum;*" and, "*Qui re commodata, vel apud se deposita, aliter usus est atque accepit, furti non tenetur nisi si interrogat id se invito domino facere;*" § *Placuit, Instit. De oblig. q. ex. delict.*

Ans. By her deposition it is plain, that any possession she had of the jewels, was only as servant, which could never intitle her to use them, or detain them; and even the pretended cause she had them for, viz. to deck babies for the diversion of the royal infants, was not so applied: and it is plain by many texts, that servants embezzling their master's goods, is not only theft, but the worst kind of it, being under trust. Besides, from the haill circumstances of the case, it is plain, the pannel was so far from committing the fact out of ignorance or simplicity, that she used great cunning and deceit in it, and disguised the jewels, so as not to be easily known, and offered them to her Majesty in sale.

The Justice, with advice of the assessors, repelled the defences, and ordained the dittay to be put to the knowledge of an assize. The assize fyled the pannel of unlawfully abstracting the pearls and jewels libelled; but cleanged her of the theft libelled.

The doom pronounced against her by his Majesty's special warrant, was to be declared infamous, to pay L. 400 Sterling as the value of the jewels abstracted, to be imprisoned in Blackness castle till she pay, and to be confined to Orkney during her life. *Nota.* The money was ordained to be paid out of the husband's effects. The warrant takes notice, that the verdict of assize did

did not find her guilty of direct theft, for which he blames the assize; but as, that, notwithstanding of the verdict, he looks on the crime as atrocious as if it had been theft. MS. Abst. i. 276. 277. 278.

N^o 22. p. 31. *Case of John Hay, 1710. Subornation.*

July 3. 1710. Mr Hay was indicted for seducing and suborning witnesses, upon act 80. parl. 6. and act 4. parl 6. Queen Mary. "The Lords found the pannel's inducing, or enticing, any person to swear, or to sign a set form of words, prepared and offered in writ, or to swear to, or give a signed declaration, concerning particular points of fact, inferring a crime, fault, or delinquency, against the pursuers, without inquiring whether the person dealt with knew the truth of the matter of fact to which he was to subscribe or swear, relevant to infer an arbitrary punishment and damages; and, *separatim*, found the pannel's enticing and inducing any person to swear or sign any particular matter of fact, by offering money, or other reward, or by threatenings, relevant to infer an arbitrary punishment and damages." There was a proof led; but before the verdict was returned, the pannel absconded, and was outlawed; upon which his cautioner was decreed to pay 200 merks, contained in his bond.—Abridg.

N^o 33. p. 63. *Case of Macgregor, 1720. Breaking prison.*

In the similar case of Francis Irvine, July 23. 1673, the court found "the libel, reply, and triply, as they are declared *ad pœnam arbitrariam*, relevant; and admits the same to the knowledge of an assize." The verdict was, "Finds it not sufficiently proven by the witnesses, that the pannel is art and part of the breaking of the prison; and therefore assails him." MS. Abst. iii. p. 258. "which (says the Abridger) they have done, not adverting to the design of the interlocutor, but supposing that, for making him art and part, it was necessary to prove, that he had concurred in the breaking. I remember this verdict did surprise the pursuer's procurators; and therefore Mr William Moir, who is one of them, is marked protesting for an assize of error. The verdict is not unanimous, but by plurality of voices." MS. Abst. iii. 259. This case is taken notice of by Mackenzie, tit. *Breaking of prison.*

N^o 34. P. 64. *Case of Muschet, 1720. Murder.*

A strange and shocking sequel to Muschet's case, is that of James Campbell of Burnbank, 21st March 1721. He was indicted, at the instance of the Advocate, for rape, violence, falsehood, and an attempt to poison, or being art and part in these crimes; in so far as, having conceived a deadly malice against Margaret Hall, wife to Nicol Muschet of Boghall, and having, together with him, hatched a most wicked and villanous design of bereaving her of her honour, reputation, and chastity, and even of her life, he, in execution of his horrid designs, did agree with the said Nicol Muschet, for the sum of L. 50, for procuring him two depositions or affidavits of the whorish practices of the said Margaret; or, which is the same thing, agreed, that the sum of L. 50, which he pretended to be owing him by the said Nicol, should not be demanded or paid, until he should procure two such depositions; though at the time he knew no such practice, and had no legal evidence thereof against her; which agreement is vouched by an obligation under his hand, lodged, with other writings, in the clerk's hands: Likeas the said Margaret, having suspected he had bad designs against her, resolved, for that and some other reason, to retire to the country; and he having notice thereof, did go to a house where the said Margaret was, at least where a carrier was with whom she was to go to the country, and did endeavour to prevail with the said carrier, by giving him money, or otherwise, to delay his departure for some time, pretending he had something to send along with him; and the carrier having accordingly staid for some time, an arrestment was used against the said Margaret and her goods, as also against the carrier and his horses: notwithstanding which, the carrier came, and got away with the said Margaret: he the pannel did that night, along with a writer in Edinburgh of his acquaintance, go to the town of Linlithgow; and having gone into the house where she and the carrier were, he, on pretence of a warrant from a justice of peace, arrested the said Margaret on certain false and injurious pretences, and threatened to put her in gaol, if she did not return with him to Edinburgh; and she being intimidated by his menaces, did return to Edinburgh next day, and went to the house of where, the better to cover his malicious intentions, he pretended to use her civilly, and that he was to act the part of an amicable compounder of differences between her husband and her; but she still suspecting his evil designs, found means to retire to Boghall; from whence, it appears

by

by the said Nicol Muschet's declaration, she was induced to return again to Edinburgh by his the pannel's means and instigation; and some time thereafter, in prosecution of his wicked purposes, he and the said Nicol having found means to bring the said Margaret late in the evening into a house in the Abbey, where they and their accomplices were, and had prepared every thing necessary for their villanous designs, he did there drink, and make the said Margaret drink strong brandy-posset, or other intoxicating liquor; and he was at the time seen to have a little glass or vial in his hand, containing some kind of liquid, which he dropped into the drinking glasses, at least into the said Margaret's, pretending it was Stockton's drops; and this having made her fall asleep, or become insensible, he and his accomplices put her to bed, and some man with her, other than her own husband; and there he, or they, did call in witnesses he had prepared for that purpose, and showed them the said Margaret in bed, and a man with her, not her husband, who villanously, in their sight, either was debauching her, or endeavouring to persuade them he was doing so, by the posture he was in, and the motions he made; and he did at the same time show the witnesses he had prepared for the said Nicol a bed in another room, and desired them to observe what they saw, because they might be called upon to give evidence of it before some judge; and in order to satisfy them fully, that the woman thus shown to them in bed was the wife of the said Nicol, he again carried them into the room where she was, after awaking her out of the sleep or state of insensibility into which she had fallen; and upon her complaining of the treatment she had received, he had the impudence to say, that the witnesses were brought in to see what sort of woman she was: Likeas, in consequence of these wicked proceedings, a summons of divorce was raised and executed against the said Margaret, at the instance of the said Nicol, and he the pannel did employ a procurator in Edinburgh to carry on the process; and being by him advised the grounds of it were narrow and suspicious, he desired it might be continued till further inquiry should be made; and accordingly, in further prosecution of his malicious intentions, he did offer rewards to several persons if they would give information of lewd practices against the said Margaret: Likeas he, with the said Nicol, and their accomplices, judging their wicked proceedings could not have the wished-for effect, did carry his design further, framing a hellish project of be-reaving the said Margaret of her life; and for that purpose, without any real cause or occasion, did agree to persuade the said Margaret, for certain simulate and feigned reasons, to undergo a course of mercury, that during that time

He and his accomplices might have an opportunity to destroy her, by affording her strong liquors, cold water, or other things unfit for persons under salivation; and accordingly he did employ an apothecary to put the said Margaret under a course of mercury, on certain fictitious pretences, by which the said apothecary was deceived; such as, that the said Nicol was then pox'd, and might have poxed the said Margaret his wife; which pretext was false and simulate, and cannot be made appear to be true; and the pannel told the said apothecary, that the said Margaret was of a strong constitution, and advised him to give her a considerable quantity of the medicine: Likeas, when the said Margaret was under this course, which lasted about a month, he, or at least the said Nicol, and their accomplices, did, from time to time, drink brandy, or other strong liquors, with the said Margaret, plainly in order to destroy her; and he and his accomplices were at pains to prevent a discovery that there was no occasion for her undergoing such a course; and at first, when she scrupled to begin it, he threatened to dart a knife into her if she did not comply: All which crimes and hellish intentions were committed and executed by a continued tract of wickedness, carried on to the time of the horrible murder of the said Margaret; and which are the more aggravated against him the pannel, that by these proceedings he did alienate the affections of the said Nicol from his wife, and thereby gave rise to the impious murder; and from the said Nicol's acknowledgement, emitted in presence of the court and jury during his trial, there is great reason to believe he the pannel had a direct hand in carrying on every circumstance of the contrivance of her unhappy death: All which, or any part thereof, or his being art or part of any of the crimes or facts above mentioned, being found proved, he ought to be punished with the pains of death, and confiscation of moveables; or at least ought to be declared infamous, incapable of all trust or office, and otherwise punished in his person and effects.

The court found the several articles of the indictment, or that the pannel is guilty art and part of any one of them *separatim*, relevant to infer an arbitrary punishment; and repelled the defences.—The jury found it proved, That the obligation libelled on, granted by the pannel to Nicol Muschet, was written and subscribed by him the pannel; and found it proved, That he is guilty art and part of the machination, as libelled and perpetrated in a house in the Abbey against Margaret Hall; and found it proved, That he is guilty art and part of raising the summons of divorce as libelled; as also found it proved, That the pannel procured a justice-of-peace warrant against the said Margaret

ret upon a false information, and that he caused execute the same against her at Linlithgow, and brought her back to Edinburgh.

The court declared the pannel to be infamous, and incapable of bearing or enjoying any public office, and banished him to his Majesty's plantations in America, never again to return to this part of Great Britain; and ordained him to remain in prison till an opportunity offered for his transportation, and bond be given, under the penalty of L. 200 Sterling, to report a certificate to the clerk of court of his being there landed; and in case the pannel return, and be found thereafter in Scotland, required all sheriffs, and other officers of the law, to apprehend his person where-ever he can be found, and thereafter commit him prisoner to the next sure prison, and from thence to be transported from sheriff to sheriff, until he is brought to Edinburgh, and there to be committed prisoner to the tolbooth, therein to remain *during life*.—Abridg.

N^o 36. p. 66. *Case of Colonel Charteris, 1723. Rape, &c.*

July 6. 1602, James Cheyne was indicted for ravishing Marion Cuck. *Obj.* She being now of age, the pursuit could only be at her own instance, and she ought to be present. It could not be sustained at the Advocate's instance, in respect it is not raised in his name, or with his concurrence. *Ans.* She is excused by the Justice, in respect of testimonials, [certificates], bearing her to be in child-bed. *2do*, The father has sufficient interest to pursue this great injury done to his daughter, though she be of age. *3tio*, Though the Advocate was not pursuer at the beginning, yet he is in the wakening, [revivor].—The Justice sustained process at the father's instance. MS. Abst. i. 209.

Alledged for the pannel, No process; seeing he offers to prove, that if he had any dealing with the said Marion, it was with her consent; and for verifying thereof, offers to prove, that she staid in his house for many days at full liberty, and might have gone where she pleased; more especially as there was no restraint upon her, as his house is within a little space of her father's house, and he the pannel was from home for many days.

Answered, Ought to be repelled, in respect of the dittay. The Justice repelled the defence with advice of his assessors.—*Nota, male judicatum*.—*Nota*, I find mention made of assessors frequently, though not marked in the *curia*, or *federunt*. The proof offered was, a horning against the pannel, and a sentence of the presbytery of Deer, for the said ravishment.—The assyze cleansed

cleansed him of the rape, but fyled him of adultery with her. MS. Abst. i. 209. 210.

Many commentators maintain, that *stuprum violentum* was not capital by the Civil law, but only punished *pœna legis Julæ de vi*, which was *deportatio*. This is the reason why in most cases of rape it is pleaded, that there was no abduction or carrying from place to place. See Mack. tit. *Ravishing*, and Royff. notes.

Ne 39. pl. 72. *Case of Mrs Macleod, 1727. Forgery.*

April 1. 1555. William Lauder, Thomas Fotheringham, and Robert Melvill, were indicted, Lauder as principal, the other two as accessories, in counterfeiting a discharge from Francis Cæsar an Italian, for fifty gold crowns of the sun. It was found false and feinzied by decree of the Lords of Session. The pannels came in will. The whole narrative of the procedure is in Latin, as also the sentence, which is as follows: "*Quam quidem voluntatem idem Justitiarius deputatus, pro tribunali sedens, declaravit, et pro suo decreto publice pronuntiavit, viz. Quod dict. Gulielmus, Thomas, et Robertus, pro perpetuo infames habeantur; in testes vel probationem nullatenus recipiend. in posterum; nec unquam dignitate, officiis, aut honoribus, in judicio vel extra, aliquatenus gaudebunt; illosque tanquam exul. a regno remove, et ad eundem minime reverti absque licentia S. D. N. Reginae; et quod omnia sua bona usus suæ Serenissimæ Majestatis eschetabuntur.*" MS. Abst. i. 25. 26.

May 18. 1556. Andrew Drummond, convicted of forging a charter, was punished with the loss of his right hand, and perpetual banishment. The sentence is in Latin. MS. Abst. i. 29.—Same punishment is inflicted in many other cases. MS. Abst. i. 32. 41. 77. 89. 91.—The first instance of a capital punishment for this crime is 1st March 1579; and in April 1580 a capital punishment is again inflicted. MS. Abst. i. 108. 177.—And again 8th February 1597. And again, by advice of parliament, 31st May 1650. MS. Abst. i. 445.

February 10. 1596. Robert Waldgrave, the King's printer, was indicted for the treasonable crime of vitiating, adulterating, and altering, an act of parliament. He declared on foul and conscience he was innocent; and if any error happened, it was owing to the person who brought him the copy, who, he believed, was the Clerk Register's servant; for he printed it

just

just as he got it: but he cast himself on the King's will.—The jury found him guilty. MS. Abst. i. 171.

N^o 43. p. 80. *Case of Macadam and Long, 1735. Justifiable homicide.*

After this (Dec. 20. 1735,) they preferred a petition to the court, narrating the procedure against them before the judge-admiral, his sentence against them, and the judgement of the justiciary, suspending it; and praying a warrant for their liberation, "seeing they could not then be said to be detained in order to trial, they having been already tried, and the instance perished." The court ordained this petition to be answered by the Advocate. His Lordship gave in a short answer, bearing, "It does not appear to his Majesty's Advocate, to be his duty *ob vindictam publicam* further to pursue the petitioners for a capital punishment; and therefore he has no objection to the Lords doing on this petition as to their Lordships should seem just." Upon this the court ordained them to be set at liberty, on their finding security, each to the extent of 300 merks, that they should answer to any criminal libel that should be exhibited against them before this court within six months from the date of the bail-bond, at the instance of his Majesty's Advocate, for the crimes mentioned in the petition.

The trial of Macadam and Long, that of William Hunt in 1711, and that of Scot and Macpherson in 1712, were laid before the House of Peers, in consequence of an order 23d March 1737, and printed in consequence of another order 19th April 1737. The trial of Macadam and Long had been before printed at Edinburgh in 1736.

N^o 48. p. 88. *Case of Macpherson, 1743. Theft.*

It was argued for the pannel, "That by the Mosaical law, theft was not capitally punished." *Ans.* "Though it is true, that by the Mosaical law, theft was not so severely punished as it since is by the laws of other nations; yet that law is not binding on us; because it was adapted particularly to the genius and constitution of the Jewish nation, where thieving was by no means common. It was none of their predominant vices; and therefore most wisely the punishment was not made very severe; especially as there was among the Jews a greater *communio bonorum* than obtained in other countries. Punish-

ments

ments are always to be made heavier or lighter according to the prevalency of the crime in the country to which the laws are given; and therefore it can scarcely be said, that any punishment is too severe, because the same crime may perhaps meet with a gentler one in another nation: And of this there can be no stronger example given than from the Mosaical law itself, which punished capitally certain crimes amongst the Jews, because the peace and quiet of the country demanded it, and the constitution of the people led them to commit them, which would in Scotland meet with a very slight censure; Deut. xxi. 18. xxii. 13. Many more instances could be given; but these are sufficient to show, that there is no arguing from the penal laws of one country to those of another. And if the laws of any other country were to be regarded in this matter, it would be most natural to consider the laws of our neighbouring nation, where it is well known horse-stealing is capitally punished." It was replied for the pannel, "That it is an opinion received by some of the most eminent lawyers and divines, that the judicial law of the Jews, with respect to the punishment of crimes, is perpetual and unalterable. To prove this, many authorities might be adduced for the pannel; but instead of mentioning a great many, he shall only appeal to the learned *Grotius*, *De jure belli et pacis*; where he says, "Est autem valde probabilis Scoti sententia fas non esse quemquam ad mortem damnare, nisi ob delicta quæ lex per Moysen data morti punivit, additis duntaxat aut quæ his sunt paria recta æstimatione; neque enim videtur notitia divini voluntatis, quæ sola animum tranquillit, aliunde in hoc negotio tam gravi haberi posse, quam ex illa lege quæ certe mortis poenam in furem non constituit."

It is said in the information for the pannel, That the jury had recommended him to mercy. This must have been done verbally; for the verdict recited in his information says nothing of it.

In 1771, a singular case enough came before the court of session, in which there was occasion to consider what authority the law of Moses ought to have in Christian countries. On the 12th October 1769, while John Wilson, a farmer in Mid-Lothian, with his son and servants, were busied in binding sheaves, and loading carts with them, in order to get in the crop of a large field of pease and beans, a number of people, men, women, and children, entered it for the purpose of gleaning, or *gathering*, as it is called. Wilson being afraid they would not only glean but pilfer, ordered them to get away; but they would not, insisting, that they had a right to do what they proposed. Upon this a scuffle ensued, in which one of the women was much hurt. She prosecuted

cuted Wilson before the sheriff of the county for damages: and he brought a counter process against her, and many of her companions, before the same judge, complaining, that a riotous attack had been made by them upon his property; and concluding for damages and punishment. The sheriff allowed a proof to both parties; and upon advising it, dismissed the woman's complaint; and in the other, he fined some of the defenders in 10 s. Sterling each to the fiscal, and decreed them to pay as much to Wilson; three of them, of whom the woman that had been hurt was one, he ordered to be imprisoned for six days. She, and some others, against whom this judgement had passed, brought it before the court of session by suspension; and the Lord Ordinary reversed the judgement of the sheriff: but upon a reclaiming petition and answers, the Lords reversed the judgement of the Ordinary. The case was circumstantial in some measure; and it was much disputed between the parties, whether it appeared from the evidence that there had been any pilfering. But the court, it is informed, went upon the general principle, That the poor had no right to glean or gather; and that the practice ought to be discouraged, because of the opportunities it affords for pilfering.

The argument for the poor people, upon the general point, was laid upon the precept in Leviticus xix. 9. "When ye reap the harvest of your land, thou shalt not wholly reap the corners of thy field, neither shalt thou gather the gleanings of thy harvest. And thou shalt not glean thy vineyard, neither shalt thou gather every grape of thy vineyard; thou shalt leave them for the poor and stranger." *Answered*, "The particular institutions of the law of Moses, unless where adopted by the legislature here, are no more binding upon a subject of Scotland, and of no greater authority in determining any matter of civil right in Scotland, than the laws of Japan, or any other foreign country. And though it were easy to show, that many of its institutions, although, no doubt, wisely adapted to the particular situation and dispositions of the people to which they were addressed; yet if applied to men of opposite genius, or placed in situations of society widely different, would be highly ruinous and improper. To oblige the industrious farmer to leave *the corners of his field* unreaped, in order to support the idle and dissipated who will not work, would make but a bad encouragement to agriculture. If the whole land in Scotland was to be left untilld every seventh year, as another precept in the Jewish law commands, it is plain that a famine could not be far off; and if the same period was to bring about a general release of debts, which is also

commanded there, it is not difficult to perceive, that commerce and credit would soon be at an end."

Replied, "It is believed to be the practice in every quarter of the globe, after a field is reaped, to leave the gleanings for the poor and the stranger. Such is the express command of the word of God, and such is the practice of every person of humanity. Many passages are to be found in scripture where the *gleaners* are mentioned, particularly in the celebrated case of Ruth; which shows, that the command in the passage above quoted had always been observed in the early ages. If one has had the inhumanity to transgress this positive command of the supreme legislator, he comes with a bad grace indeed to demand pains and penalties against those who have done no more than what they are authorised to do by the book which is pointed out to them as the rule of their lives and actions. They confess they are not casuists enough to be able to discover why this precept should not be extended to every nation which professes to believe in the word of God. The command is founded in wisdom and humanity; in wisdom, that nothing may be lost; and in humanity, that the poor may be able to pick up some small pittance, which no farmer would think worth his while to employ his servants to gather. And they do confess further, that they can see no reason for putting the laws of God in comparison with the laws of Japan, because some of its precepts are more peculiarly applicable to the nation for which they were specially intended: but where circumstances do not alter, the respondents do maintain, that they ought always to have the greatest weight in every Christian country."

For Wilson, Blair. Alt. Ch. Hay.

N^o 52. p. 98. *Case of Wallace and Ferres, 1747. Rape capitally punished.*

Feb. 20. 1650, William Macrie, a soldier, indicted for forcing and ravishing Margaret Caltman, a poor lame bedrid lass. The assize found him guilty. *Decollat. i. e.* beheaded. MS. Abst. i. 444.

In the information for Wallace and Ferres, it is said, "In the whole books of Adjournal, where all sorts of crimes are collected together, they have not been able, after the most diligent search, to find above five accusations of rapes, and not one example of the crime ever being found proven." Macrie's case, and some others, *infra*, p. 756. show this to be a mistake. It might, however,

ever, have been said, that in no case has the crime been found proved, in which nothing but fair force (if I may use the expression) was exerted. In Macrie's case, the woman was not able to resist; in the cases, *infra*, p. 756. the girls were infants, or but just past pupillarity. In this case, the woman was mastered by blows: besides, the ravishers were two to one: and therefore they were justly condemned.

N^o 55. p. 100. *Case of Livingstone, 1749. Murder.—Minority.*

At the circuit-court held at Lauder, Nov. 13. 1749. "Quo die, Thomas Gothrastone, juvenis, in judicio fatebatur interfexionem Johannis Smyth, filii Thome Smyth: quapropter ordinatur per justiciar. vicecomes Dominus de Corsby, ad hoc jurat. affligere eundem Thomam Gothrastone, pro hujusd. interfecc. apud ecclesiam de Ligerewod, in cujus parochia dicta interfeccio fuit commissa, in die solenni, usque ad effusionem sanguinis, quia dictus Thomas Gothrastone commisit dictam interfeccionem *in octenio*, et in hac ætate non poterat ad mortem pro crimine justificari." *Record in libr.*

Feb. 3. 1556, Robert Barclay and David Mackay were indicted for the slaughter of John Clerk. His prolocutor pleaded, "That he ought not to pass to the knowledge of an assize, because he is minor, and of less age, not being twenty-one years, as may be seen by inspection of his face." *Ans.* "That he is of age; and though he were not, yet ought to pass, in respect he is an able man of person, and outwith the Queen's proclamation." The haill assize has convicted and fylit the said Robert Barclay of the slaughter of John Clerk be his own confessions; and as to the punishment and execution of him, refers to the interlocutor of the judge anent his age. MS. Abst. i. 35.

June 17. 1557, John Pearson, a minor, convicted of slaughter, only banished. MS. Abst. i. 37.

Aug. 23. 1561, James Guild was indicted for theft. Alledged by his prolocutor, "He could not pass, &c. because he was minor, not 18 years auld; 2do, That he is deaf; 3tio, That he is subdued by an malevolent humour, which he derives frae his progenitors, of *tedium vite* swa [so] that he is mair [more] desirous to die than live." The Justice finds, That the same matter should pass, &c. notwithstanding any alledgeance, because of the practice seen of before.—Protestit Sym, i. e. appealed. The assize fylit him. MS. Abst. i. 50.

October 21. 1564, Elliot of Horselichill, and five others, were indicted for the slaughter of David Scot of Hassenden. Elliot was discharged because of nonage: On the margin is marked (*puer*).

August 6. 1605, Archibald Maxwell of Cowhill, and his son, indicted for the slaughter of Maxwell of Kirkhill. Alledged for the son, "He was not past twelve years of age, and so *non capax doli*." *Ans.* "Ought to be repelled as no ways relevant to stay the matter being put to the knowledge of an affize; for all things in fact may be tryit be the affize: and *esto* he had been minor, it proves no *impunitie*, the fact being committed in manner libelled."—The Justice, notwithstanding the alledgeance, sustains process, and remits to the affize to take cognisance of his age, if they think expedient. After the affize was sworn, the defence of nonage was again pleaded: and he "being examined as to his age, declared he was not above twenty-five years; and so consequently was not four when the fact was committed, being *in anno* 1583." The affize cleged Archibald Maxwell of the crimes libelled, but fyled William his son of shooting of hagbuts within a spear's length of his father's house; and that he was then within fourteen years of age. MS. i. 224. 225.

March 1701, William Frazer, Thomas Duff, William Miller, and Alexander Anderson, were tried for housebreaking and theft. The libel was found relevant against Frazer and Anderson to infer the pains of death; but only an arbitrary punishment against Duff and Millar, "in regard that, by their confessions, and ocular inspection, they appeared to be under age."

Nº 56. p. 120. *Case of Beggs, 1750. Bestiality.*

February 1650, a man for this crime was condemned to be worryt at a stake, and his body to be burnt early in the morning. MS. Abst. i. 445.

Feb. 2. 1653, Margaret Rany was indicted for bestiality or buggery. The indictment bears, "That she was a *hermaphrodite*, both male and female, but had the use and strength of the masculine sex, and committed bestiality with a gray mare."—She was found guilty, both in respect of her own confession, and of the depositions; which last are not recorded. She was sentenced to be strangled, and then burnt to ashes; and the court ordered the mare to be killed and burnt. MS. Abst. i. 448.

Cecilia Wilson, in 1763, brought a process of adherence before the commissaries against Matthew Hudson, setting forth, "That on the day of

a marriage had been celebrated and consummated between them ; and therefore concluding as usual.

The very extraordinary defence made against this action was, That the defender being a woman as well as the pursuer, it ought to be dismissed.

The commissaries remitted to a physician and surgeon to examine the defender, and report. This they did ; and reported, That she was a woman ; upon which the process was dismissed.

This defender pretended to be a man, and was dressed in a man's cloaths when she married the pursuer ; and she had all along been in the practice of using such disguise. When asked her reason, she alledged, her mother had been left an estate in England, on condition she had a son ; and that really having had none, she caused her daughter act the male.—This was not a very satisfactory answer. She said, too, That she had travelled over great part of Europe in the station of valet-de-chambre to a gentleman without being discovered.

This case makes for the opinion of a late French author, who asserts, That almost all hermaphrodites are females. See *Recherches philosophiques sur les Americains*, tom. 2. p. 88. Mr Vermeil, a French lawyer, has published a memoire upon a similar case, Jan. 10. 1765.

Lord Royston, in his MS. notes on Mackenzie, p. 82. observes, “ Lyndsay of Pitfcottie, in his History of Scotland, *in vita Jac. II.* p. 65. writes, “ Then an hermaphrodite, called in our language a *scart*, who went apparelled like a woman ; in which habit she beguiled a young woman in Linlithgow, and gat her with child ; for which she was condemned to be burnt quick. *Sed quo jure inquirendum.*” A text in the Mosaic law, Deut. xxii. 5. forbids the dress of the one sex to be used by the other.

N^o 59. p. 127. *Case of Gray, 1751. Forcible abduction and forcible marriage.*

Nov. 8. 1616, Sir Patrick Chirnfyde of East Nisbet, and others, were indicted for the violent rape, ravishing, away-taking, and detaining, of Adam French of Thorndikes, a boy scarce past fourteen, from place to place, and at length marrying him to Sir Patrick's daughter, but [without] consent of Sir John Home of Northberwick, who had the gift of his ward and marriage.—There are long pleadings, but no interlocutor, the Advocate declining to insist, “ I suppose (says the abridger) chiefly upon the young man declaring
“ judicially

“judicially he did not concur in this process, but dissented from all prosecution.” MS. Abst. i. 298.

Nov. 23. 1649, Lieutenant Mark Ker was indicted for the rape of Alexander Cunningham son to Colonel Cunningham, in Pomerania, a boy of fourteen years, at the instance of the boy's uncle.—Pleaded in defence, “The pursuer has no interest to pursue this action; because the estates of parliament had ordained him to deliver the boy to Mr Thomas Henderson. 2do, The boy is now *egressus pubertatem*, and so *sui juris*, and had chosen curators; consequently the pursuer is not a proper person to insist in the process. 3tio, Killburne, who brought the boy home from Germany, his father being dead, ordered the pannel to take him away from the pursuer, in order to return him to his friends in Germany.

“Ans. The King's Advocate insists for his Majesty's interest. 2do, The pursuer has a good interest, both as being nearest agnat, and as being served tutor at law, and as the person out of whose possession he was taken.—He was remitted to an assize. MS. Abst. i. 443.

N^o 60. p. 137. *Case of James Macgregor, 1752. Hamesucken.*

June 29. 1590, James Herrin was indicted for the rape of Agnes Blair.—She appeared in judgement, and declared he had not ravished; but that she readily, and with her own consent, passed away with him. Upon which he was acquitted. MS. Abst. i. 151.

Jan. 11. 1590, Andrew Downie was indicted for the rape of Effie Clark.—She appeared in judgement, with her mother, and declared, that what had been done was without violence.—To this her curators alledged, That she was influenced by the pannel to give this declaration, but if she *were sequestrate* into the custody of an neutral person, she would tell the truth; and produced for that effect a precept from his Majesty. The pannel objected some informalities to the precept. The Justice took the point to avifandum, till the *King's pleasure* should be known; which being that afternoon signified by the Justice-Clerk's brother, the Justice ordained the pannel to be set at liberty without caution.—It is probable, that there being many such disclamations about this time, occasioned the act made anno 1612. MS. Abst. i. 155.

Lord Royston, in his *Notes on Mack.* p. 84. takes notice, that “Spottifwood, in his *Hist. ad ann.* 1609, p. 510. says, That for repressing rapes, which “were grown too common, the King did, by his letter to the parliament, re-

“commend

“ commend some overtures for restraining such violences; such as, That if a woman should be taken away, albeit no further injury should be done, and she relieved, by whatever means, the violence intended should be punished by death, in regard the party had endeavoured to do his worst. *Item*, That if a woman should be forced against her will, the crime should be capital, and not purged by the subsequent consent of the woman. *Item*, That they who should entice a woman to go away from her parents or tutors, without their consent, should be excluded from her lands or goods. But all that appears to have been done in consequence of that letter, is a commission concerning ravishing of women, mentioned among the unprinted acts, parl. 20. *quod vide*; and the 4th act of the subsequent parliament 21. which enacts, That the subsequent consent or declaration of the woman, shall free the committer from the capital, but not from an arbitrary punishment.”

Sir W. Pringle, Lord Newhall, mentioned in the first information for the crown in this case of Macgregor, (p. 144.), was a gentleman of uncommon worth and ability. He died in 1736. The Lords of Session attended his funeral in their formalities; and on the day he was buried, the Faculty of Advocates entered in their books an eulogium on his character.—He was admitted one of the Lords of Justiciary in 1718; and it is probable, that the variation which soon after took place in the style of interlocutors on the relevancy, was owing to him.

It is admitted in the second information for Macgregor, that the judges, when they delivered their opinions on the relevancy of the indictment against him, held, that hamesucken still is a capital crime.

The declarations of Jean Kay were read as evidence against James Macgregor. One of the clerks of court, and another witness, deposed to their authenticity.

In January 1753, Duncan Macgregor, another of the brothers, was brought to trial for being an accomplice with them. The court pronounced the same interlocutor on the relevancy.—The following particulars are transcribed from the notes of one of the judges.

Jan. 22. 1753. It was proposed for shortening it, viz. the trial, that some of the depositions taken in the former trial might be read over to the witnesses, which the pannel's counsel, it was said, were ready to admit. But some of the court seemed to think that could not be done legally, and that the court and jury could not proceed upon any evidence other than what should be taken down in writing in this very trial; and that it might be of dangerous consequence

sequence to pannels, if such admissions were received. Lord S. said, there was a precedent, after the act 1672, in which, in a trial for life, Sir George Lockhart for the pannel offered to admit the oath or declaration of a witness who had been precognosced, after reading the same to the jury, as evidence, rather as the trial should be put off, because the witness did not appear; which the pursuer first, and then the court, agreed to; and I observed, that as the pannel could admit or confess the whole libel, I did not see why he might not admit any part of the evidence to be just what the witness would swear; and that no bad consequence could follow upon that, as pannels had it in their power to admit or not, and seldom were too forward in admitting. But it being represented, that the Lord Advocate refused to allow this to be done, there was an end of this proposal, as either party might object to it; and in that case it was not to be agreed to by the court: and so the court gave no judgement in the matter.

But just the same was proposed, and admitted by the Advocate, and then by the court, as to the exculpatory witnesses led in James's case. In this case, after the Lord Advocate had finished his proof, he declared, he did it under protest, that if the pannel's counsel intended to use the several bills of suspension which were offered to the Lords of Session, as evidence of Jean Kay's subsequent consent, or any consent, to her marriage with Robert Macgregor, he hoped he should, by way of reply, be allowed to read the record of court, touching the said Jean's declarations, whereof an extract is ready to be produced, to take off any weight which may be laid upon the said bills of suspension. But it being objected by the pannel's procurators, That it was a novelty to allow the Lord Advocate a proof by way of reply, and that if his Lordship had any other evidence, he must now produce it, the court was of that opinion. Then the Lord Advocate opened his further evidence, viz. the declarations of the said Jean Key, taken by the authority of this court, and recorded in the books of adjournal, which he insisted for liberty to read as evidence in this cause; and observed, that though, by the 11th article of the Regulations 1672, it is provided, that a list of witnesses and assizers should be given out with the libel, this was quite satisfied in this case; for so are all the witnesses and assizers. But it is added in the article, that the pannel may summon witnesses to prove objections against witnesses or assizers; but against the record of this court it is impossible to prove any objection.—The record of a court is truth, and held as such. That his only aim was to bring out the truth; and as he does not oppose the pannel's procurators making the best use they

they can of the suspensions, the record of the court of session, they ought not to oppose his using the record of this court by way of evidence. That he had no inclination to bring any evidence that was not good, and no opposition should be made to evidence which would state the whole truth to the court and jury; which could not be done, if this material part of evidence was stifled.

It was answered by the pannel's procurators, That the case under consideration was of the highest consequence, greater far than the fate of the present pannel. For if what is now insisted on by the Advocate was given way to, it might throw loose the whole security provided by law for pannels: for though the article mentions only witnesses; yet truly the meaning is, that the evidence to be used by the prosecutors should be contained, either in the libel, or in the list with the witnesses; and so in practice it has obtained: nor can any one instance be produced where such a writing, or any writing, was allowed to be read to the jury, not referred to in the libel, or list of witnesses, and referred to as in the clerk's hands: and as that was not done in this case, though it was in James Drummond's; and as, in this very case, the two fugitations produced, are libelled on, and referred to, as in the clerk's hands; and that such has been the practice of the court constantly, which is an excellent interpreter of the statute, it was hoped the court would reject the evidence now offered. Had it been duly produced as evidence, it would have been competent to the pannel to have proved, that it was procured by force or corruption, and to have summoned witnesses to have proved the fact. And as to that part of the argument, That these declarations were a matter of record, it was answered, That a matter of record was not evidence to the court or jury. These declarations are no more evidence, because on record, than any of the depositions in James Drummond's case, which yet no body will say could possibly be read as evidence in this cause.

The court began to reason upon this matter; but inclined to wait till it should be as full as possible; as every moment the Lord Justice-Clerk was expected to come; which soon happened: and then the Lords gave their opinions against receiving the extract of these declarations, or reading the same as evidence to the jury; taking notice, in giving their opinions, of the principles mentioned by the pannel's procurators, the constant practice of the court; and this much more, that such declarations not only must be libelled on, and put into the clerk's hands, but though the original, which must be better than the extract, were libelled upon, and produced; yet, if it were not supported, and proved to be true, by parole-evidence, it would be good for nothing:

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wherefore it was impossible to take an extract as a proof of the whole of these things, when not so much as a proof was offered by parole-evidence, that the extract was a true extract by him who made it; though even that would not be sufficient."—None of these particulars appear from the record. The jury found the pannel not guilty.

P. 152. at l. 4. &c. for, he obtained a pardon, &c. read, he obtained permission to return to this country for a limited time; upon expiry of which, having been ordered away, he retired to France, and there died.

N^o 62. p. 153. Case of Robert Macgregor, 1753. Hamesucken, &c.

Aug. 6. 1753, he was brought to trial on two indictments; one for the murder of John Maclaren, (See the indictment against James); and this indictment bore, That he was further to take notice, that the depositions of two witnesses examined against James were to be used against him, these witnesses having since died, and that extracts of them were in the clerk's hands. The other was for the crimes committed against Jean Kay.—These indictments were cast, upon this objection to the executions, That none of them mentioned to which indictment they referred. They might both refer to one; and it did not appear to which.

N^o 66. p. 169. Case of Nicol Brown, 1755. Murder.

P. 177. Internal flame, arising from the excessive use of spiritous liquors, &c.—In Collection academique sur l'histoire naturelle, &c. à Dijon 1756, tom. 4. p. 15. 16. it is said, that flame may be made to come out of the stomachs of dead animals, by a certain method of tying, squeezing, and then opening them. It is there too related, that at several public dissections, vapours in the stomach of the subject had several times taken fire. The chapter in that book from which these particulars are taken, concludes in these words. "Ce n'est pas seulement de l'estomac des cadavres qu'on a vu sortir des flammes; plusieurs auteurs très connus assurent, que ce même phénomène a été observé dans les hommes vivans. Thomas Bartholin, cent. 1. "rapporte d'après Adolph. l'Orstuis, qu'un cavalier Polonois du tems de "la Reine Bone, ayant bu deux verres d'eau de vie, étoit mort, après une eruption des flammes par la bouche. Le même Bartholin, cent. 3. "rapporte

“rapporte encore l’histoire de trois autres personnes, qui après une débauche
 “d’eau de vie, éprouverent les mêmes symptômes ; dont deux furent aussi
 “suffoqués par les flammes, et le troisième n’évita la mort qu’en buvant
 “promptement de l’eau froide, et ce qui convenoit encore mieux, du lait de
 “chevre.”

N^o 69. p. 186. *Case of Forbes, 1758. Virginis immatura contractatio,*
&c.

Forbes’s crime was aggravated by the highest breach of trust ; and his case seems somewhat analogous to that of a tutor who debauches his ward, or of a priest who debauches women whose confessor he is. The courts of France, though without any particular law against these crimes, have not scrupled however to inflict a capital punishment on those who have been guilty of them.
 “Arrêt du parlement de Grenoble, du 31. Janvier 1660, qui condamna un
 “prêtre d’être pendu, puis brûlé, pour avoir abusé du sacrement de confession, porté ses mains sur le sein et autres parties de plus de cent femmes
 “pendant qu’il confessoit. *Basset, tom. 1. liv. 6. tit. 19. chap. 6.*” *Dict. des arrests, voce Confesseur.*

“Si un directeur, qu’on pretend avoir abusé de sa penitente, a pu être
 “condamné à mort, n’y ayant ni loi ni ordonnance qui impose cette peine
 “à ce crime. Ce procès a été jugé à la Tournelle criminelle, par arrêt du
 “22. Juin 1673, lequel a confirmé la sentence du lieutenant criminel du châtelet de Paris, et le lendemain 23. Ce prêtre, directeur de religieuses, fit
 “amende honorable à Notre Dame, ensuite il fut pendu et brûlé avec son procès, dans la place Maubert. *Journal du palais, tome 2. pag. 972. et*
 “*cy-apres inceste spirituel.*”

“Un tuteur ayant été trouvé par les Capitouls couché en chemise, avec sa
 “pupille, âgée de 10 à 11 ans, toute nue, dans un lit, étant appellant de la
 “sentence de Capitouls, qui l’avoient condamné à être mis en quatre quartiers : mais étant certifié par la visite faite par deux bartuers et deux sages
 “femmes, que la fille n’avoit point été déflorée, fut seulement condamné à
 “faire amende honorable en audience, en chemise, tête nue, la hart au col,
 “et une torche ardente en la main, et aux galères pour dix ans, et en 500
 “livres vers la dite pupille pour son mariage, et en 100 livres à la réparation
 “de la ville. *Arrêt du p. du Toulouse, du 13. Sept. 1551. Dict. des arrests, voce Tuteur, tome 3. p. 781. n. 44.*”

It is informed, that it did not appear from the evidence Forbes had ravished any of the girls, but that they were rather willing. They were not put upon oath. I was present when he received his sentence; and remember, that after it was pronounced he made a long canting speech to the court, full of quotations from scripture. Some of them being peculiarly improper, and occasioning laughter, the court silenced him before he had done.

July 3. 1638, William Bell, convict of ravishing Janet Falconar, a girl of twelve years of age, *et suspens.* i. e. hanged. MS. Abst. i. 24.

Feb. 20. 1639, Henry Spendie, butcher in Edinburgh, was indicted for forcing, *deflowering*, (See p. 90.), and abusing, the body of Agnes Stewart, an infant of six years of age, by riving [tearing] her secret parts, to the effusion of her blood, and hazard of her life.—He judicially confessed the fact, and two doctors and a surgeon deponed, “Quod parietes pudendi erant excoriati ab agitatione; quod inum pudendum, qua cum anu conjungitur, erat laceratum; quod a summa parte pudendi os pubis erat depressum; quod partes incumbentes illi valde intumescabant, et magno cum dolore cruciabantur; præterea quod ipsa capacitas pudendi erat dilatata ad quantitatem pudendi fere in pubere; et hæc censemus esse vera indicia læsæ virginitatis ruptæ.”—He was found guilty, and sentenced to be hanged.” MS. Abst. i. 375. 376.—A libel for the very same fact was found relevant against James Gray cobbler, Aug. 9. 1703. The jury found, “That the child Isabel Cleugh was in the house with James Gray, but not seen until the door was opened; and found the said James Gray was lying on the floor, moving his belly up and down, and that he refused to open the door after several rude knocks.—He was dismissed. In this case it was pleaded for the pannel, That there was no laceration libelled. *Ans.* Though that be an aggravation when it happens, yet *specialties* may prevent it.—In 1761, one Ripley, a corporal, was hanged for ravishing a girl of six years of age.—There was a terrible laceration proved in that case.

Feb. 2. 1641, Alexander Gylor, climber in the Bass, indicted for the rape of Janet Bouffie, a girl of ten years of age.—The proof was, declarations by midwives and doctors of the child having her body lacerate; but no proof is recorded of the pannel having committed the crime. The assize, however, found him culpable and guilty; with this declaration, That they could not find, nor affirm, that the pannel had sick [such] carnal copulation with the young virgin as a man has with a woman, in respect of her young years.—He was sentenced, in obedience to an act of council, to be scourged, burnt in the
check,

check, and banished for life; and to be imprisoned, till an opportunity offer of sending him abroad with an officer. MS. Abbt. i. 390.

No 71. p. 209. *Case of Janet Heatly, 1761. Child-murder.*

Our act 1690 seems to have been copied from a French statute; which is thus stated in the *Dict. des Arr.* under *Grossesse celée*: “Il y a edit du Roy Henry, que toute femme qui se trouvera durement atteinte, et convaincue d’avoir celé, couvert, et occulté, tant sa grossesse que son enfantement, sans avoir déclaré l’un et l’autre, et avoir pris de l’un et l’autre temoignage suffisant, même de la vie ou mort de son enfant lors de l’issue de son ventre, et qu’après se trouve l’enfant avoir été privé du saint sacrement de batême, et sepulture publique et accoutumée, soit telle femme tenue et réputée d’avoir homicide son enfant, et pour la reparation punie de mort, et de tel rigueur que la qualité particuliere le meritera.”

The act 1690 declares, that “if any woman shall conceal her being with child during the whole space, and shall not call for and make use of help and assistance in the birth, the child being found dead, or amissing, the mother shall be holden and reputed the murtherer of her own child; and ordains all criminal judges to sustain such process: and the libel being remitted to the knowledge of an inquest, it shall be sufficient ground for them to return their verdict, finding the libel proven, and the mother guilty of murther, though there be no appearance of wound or bruise upon the body of the child.” It will be observed, that though the act obliges the court to sustain the relevancy of concealment, yet it varies the expression when it comes to speak of the verdict, and leaves the jury at liberty to give what weight to the concealment they think proper.

Indeed, though the statute had meant, that every woman who had concealed should die; yet it would have been improper to use imperative words as to the verdicts to be returned, especially as by this time juries were not triable for error.

There is a passage in *Principles of penal law*, which, though long, I cannot forbear transcribing: “Penal laws are to check the arm of wickedness, but not to wage war with the natural sentiments of the heart. Contrary to this principle is the statute, which, making the concealment of pregnancy undeniable evidence of murder, compels unhappy women to break
“ through

“through the becoming pride and modesty of their sex, and to be the first
 “official publishers of their own shame.” Then in a note, 21st James I.
 ch. 27. “That women delivered of bastard children, to avoid their shame,
 “and to escape punishment, do secretly bury and conceal the death of their
 “children,” is the preamble of the statute: the modern exposition of
 “which is a good instance, that cruel laws have a natural tendency to their
 “own dissolution in the abhorrence of mankind. It is now the constant prac-
 “tice of the courts to require, that the body of the child shall be found, be-
 “fore any conviction can take place: and if it should happen, that the mo-
 “ther had any childbed-linen, or other preparatives in her possession, prior
 “to her delivery, it is generally admitted as a proof, that no concealment was
 “intended. Lastly, it is not unusual to require some degree of evidence,
 “that the child was actually born alive, before the ungenerous presumption,
 “That the mother was the wilful author of the death of her new-born infant,
 “is permitted to affect her. These humane deviations, from the harsh in-
 “junctions of the statute, have nearly amounted to a tacit abrogation of it.”
 See, too, Voltaire’s Commentary on Beccario’s book, § 1.

It is not a little surprising, that the laws of polished nations should have dif-
 fered so very much as to *infanticidium*. It is allowed to parents at this day
 among the Chinese; and thousands of infants are exposed and perish every year
 at Peking in the most shocking manner. See *Recherches Philosoph. sur les*
Egyptiens et les Chinois, tom. 1. p. 61.

It was allowed in several states of Greece; and Aristotle approves of giving
 this right to parents. See Noodt’s treatise, intitled, *Julius Paulus; five De*
partus expositione et nece apud veteres, c. 1. Though it was not permitted
 by Romulus, or the laws of the Twelve Tables; yet it took place among the
 Romans afterwards, and continued even under the reign of Constantine, and
 other *Christian* Emperors. It was first discharged, under pain of death, by
 Valentinian, l. 2. C. *De infant. expos.*; *id. ibid.* c. 2. 5. 6.

The same author transcribes a passage from Plutarch; from which it ap-
 pears, that the Stoics held the *fetus in utero* to be *partem ventris, non ani-*
mal. “Empedocles foetus non esse quidem animal, spiritu tamen præditum,
 “in utero; primam autem animalis respirationem fieri cum partu editur,
 “decedenti humore qui est in foetu, et in exhausti locum succedente in vasa
 “referata aere externo. Diogenes inanimata nasci animalia; sed cum calore
 “atque insitum calorem simul atque natum est animal, animum in pulmone
 “attrahere. Herophilus naturalem foetus in utero non animale motum per-
 “mittit,

“mittit, motusque causam edit nervos; animalia autem tum demum fieri,
“cum ex utero effusa aliquid aeris accipiunt.”

This strange theory, that the foetus is at no time alive in the belly, though it may go far to excuse women who procure abortions, yet has not the least tendency to excuse the exposing the foetus after it has drawn breath; upon which all agree it immediately becomes an animal.

The law of England seems, in some measure, to have adopted this theory. By that law, (according to Hale), the plea of pregnancy does not stay execution of a capital sentence, unless the woman be with child of a quick child; Pleas of the crown, vol. 1. p. 368. 369. This supposes the theory of generation to be better ascertained than it is, or, in all probability, ever will be. How can it be known, but that the foetus may be alive before it stir in the belly so as that its motions may be felt? See the Encyclopedie, voce *Ame*, vol. 1. p. 330.

A late French author has revived another theory of generation. He maintains, that the foetus is completely formed in *semine virili*; and he asserts, that, with a microscope, he saw one perfect in all its parts in a drop of that liquor let fall into a glass of water. He gives a drawing of this *homuncio*; from this he infers, that *le premier accouchement* is by the male, the other by the female; and that the two differ only as *majus et minus*; *Cautier, obs. sur l'hist. natur. à Paris*, 1756. If this theory be just, many strange inferences as to child-murder might be drawn from it. But the law does not view things with microscopic eyes. See, as to this theory, Encyclopedie, voce *Animalistes*.

The plea of pregnancy, supported by the affidavit of midwives, has been always sustained by the court of justiciary, without ever inquiring (so far as I remember) whether the woman be with quick child or not. The Roman law makes no such distinction; l. 18. ff. *De stat. hom.* It does not allow a woman with child to be put to the torture; l. 3. ff. *De pæn.* Neither indeed ought she to be whipped, or made to undergo any corporal punishment that must occasion a violent shock to the body. The French courts also stay execution when the pregnancy is certain, without inquiring further; *Dict. des arr. under Grossesse cèlee*.

If the idea upon which the law of England just now mentioned, proceeds, be well founded, does it not follow, that a woman who procures an abortion before the child be quick, ought not to be at all punished? yet all lawyers are agreed, that she incurs an arbitrary punishment.

N^o 72. p. 211. *Case of Janet Ronald, 1763.*

OPINIONS on this Case.

STRICHEN. I am of opinion, that adjourning the court falls under the two acts. It has been the constant practice to inclose immediately. If one adjournment be made, another may be made; and so one jurymen might have fallen ill again.

Supported by practice, Sir G. Mackenzie and L. Royston. *Nota*, This was irregular to adjourn before the jury inclose. Notes on two cases in Sir G. Mackenzie.

If a necessity should happen, the jury may be dismissed, and the pannel prosecuted anew. Nothing in the law hinders it: the peace of the public requires it.

AUCHINLECK. I am of opinion, that it is not in the power of the court to adjourn, after the jury is charged with a pannel. The great security of subjects is trial by juries: particular care to keep them chaste.

If, after the jury is charged with the pannel, there are opportunities to tamper, the trial must fall; the verdict they give cannot produce a sentence. Pannel now intitled to be acquitted, because proceedings irregular.

It would be dangerous if such accidents should produce an absolute acquittal. In England, many instances of discharging a jury, and taking a new one. Whitebread's case, 1679, a bad one, and justly censured. Lord Delamere's case.

But in later cases, it is fixed, that when such accident happens, the jury may be discharged, and a new one set.

I am for putting it into the interlocutor, that the jury might have been discharged, and the pannel tried anew.

ALEMOOR. I am of opinion we did wrong. A jury ought never to be adjourned on any account, after charged with the pannel. This does not fall directly under the acts; but it is there supposed, that they are to inclose directly: So Sir George Mackenzie; and he candidly disapproves of the two decisions. Practice has confirmed this.

An adjournment, even before proof is finished, the same opportunity of tampering. I am also of opinion, that the jury might have been dismissed, and the pannel tried anew. At the same time, no discretionary power of dismissing the jury; it can only be in cases of the most urgent necessity.

There

There is no reason or sense, that such accidents should operate a total acquittal.

In England, the solid rule is, That a jury once charged, cannot be discharged without a verdict. But in cases of accident, they may be discharged, and the pannel tried anew. There may be a discharge in cases of necessity, but not a voluntary one.

Had the judges at Perth discharged the jury, the pannel might have been tried anew; but she has suffered by going on, and may be under disadvantages as to a new trial.

KAMES. I am of opinion, that the diets of the justiciary-court are peremptor; and in cases of necessity, the trial must fall.

I also think, that the pannel may be tried anew.

I am not clear how far, in this case, the pannel may not be tried anew: however, I acquiesce.

JUSTICE-CLERK. The court all agree. Of same opinion. I always thought that no adjournment can be made.

The instance may perish, and a new trial brought, agreeable to the law of England.

Dangerous, if the jury has gone through the town, to impanel them again.

The sanction of a jury's being tampered with, is to acquit, by the acts.

Consent cannot do in a capital case; and in others, not unless there be the utmost necessity.

Feb. 19. 1672, Henry Gordon having been brought to trial for deforcement, the verdict returned was, "Having considered the libel, and depositions of witnesses, against Henry Gordon of Braco, the verdict of the assize is, Guilty, except three persons."—Sentence was delayed till the 26th. Then it was objected by the counsel for the pannel, That no regard can be paid to the verdict, because two of the jurors, before it was wrote out and subscribed, went out of the room in which they were inclosed, and spoke with several persons, and did not return, until a macer, and another person, expostulated with them, and forced them back; which was clearly contrary to the statute.

Ans. The two jurors did not come out from any bad design, and not till after the verdict was agreed to; and the jury only can judge, whether the sta-

tute has been contravened ; for the act exprefsly fays, they are warranted to affoilzie the pannel.

Replied, The meaning of the act is not fuch : and it would have been abfurd if it had ; for what if the whole jurors had withdrawn before the verdict was fubfcribed ? It cannot be maintained, that they themfelves muft judge whether they had difobeyed the act. The jury have not an arbitrary power of acquitting or not : when the act is difobeyed, they muft acquit ; and the court, finding the matter of fact relevant, and proved, may ordain the jury to affoilzie, and declare the pannel free.

The court, by their interlocutor, repelled the alledgeance, in refpect of the answer, “ unlefs the pannel would alledge in thir terms, “ viz. That fome of “ the members of inqueft came out before the votes were concluded ; and after gathering thereof, the chancellor had verbally intimate the fame to the “ affize, albeit the verdict was not formally reduced *in fcriptis*, and fubfcribed : And the Lords find, That they themfelves are judges to the relevancy “ of the faid alledgeance ; and the probation ought to be before them, and “ thereafter to be remitted to the fame affize ; who were to inclofe, and return their verdict thereanent.” MS. Abft. iii. 127.

N^o 74. p. 258. *Case of Sir John Gordon, 1766. King's Advocate cannot be compelled to give his instance to a profecution.*

Jan. 24. 1726, a petition was preferred to the court of jufticiary by Margaret Jamiefon, and other people in Glasgow, fetting forth, “ That a bill for obtaining criminal letters, at their instance, charging Captain Bufhell, and others, to appear and ftand trial, for the crimes of murder and mutilation, committed by them upon a number of perfons, near relations to the petitioners : That this bill was prefented to his Majefty's Advocate, and his concurrence required in common form ; and after feveral protests taken againft him, he alledges, that certain remiffions from his Majefty have been prefented to him, pardoning the crimes of which the faid perfons were accused ; and that therefore no concurrence for the crown can be given : That the petitioners fhall not enter upon the queftion, Whether the Advocate ought to concur, notwithstanding thefe remiffions ? but fhall only obferve, fhe knows not whether thefe have been duly obtained and expedite, nor indeed any thing at all about them ; and therefore the profecution fhould go on, till thefe are pleaded on by the parties accused, when the profecutors will have an opportunity of objecting to them : That in
feveral

several cases, prosecutions had been carried on after the Advocate's concurrence was withdrawn, as in the case of a soldier tried some years ago for a murder, and Charteris's case. Since, then, prosecutions may be carried on after the Advocate's concurrence is withdrawn, it is plain they may be commenced without it. Besides, it was never pretended he can prejudge the claim of the private prosecutor to an assythment; and therefore the prosecution should go on, as an assythment is not due till *constat de crimine*; and that cannot be cognosed any where but in this court; therefore praying their Lordships to grant warrant for criminal letters," &c.

Jan. 24. 1726, the court ordained this petition to be answered by his Majesty's Solicitor and Advocate by to-morrow at twelve o'clock. Jan. 27. answers were put in for the Solicitor; in which it is admitted, "That his concurrence had been required, as set forth in the petition; but he represented, That the intended prosecution was not of a private nature; that it concerned the administration of his Majesty's government and public justice; and as to such, it had never been thought, that the crown-lawyers were under the power and direction of private complainers. It was their duty not to give the concurrence of the crown to vexatious suits; and in no case did the court ever enjoin or ordain the Advocate to give his concurrence to a criminal bill: That willing to avoid general questions that might be attended with difficulty, he shall not state the reasons why the interposition of the court has not at any time heretofore been demanded, and why, he believes, it would not in this case be granted: it is sufficient for him to say, that no person can seriously believe the power of prosecuting *ad vindictam publicam* derived from the crown, can be moved at pleasure by private parties. He has not yet refused his concurrence; but apprehending the case required attention, has forbore to give a positive answer to the demand, as the petitioners had delayed for several months to offer any accusation, while the parties they now want to prosecute were in the King's service; and he hopes the reasons assigned in his answer to the protests referred to in the petition, will justify his delay hitherto, and excuse him from being obliged to give a positive answer forthwith, as no cause is shewn why such a prosecution should be hurried on. He declares, from the regard he has to the court, that it was always his intention to give satisfaction to the parties within a reasonable time, either by concurring or refusing, if he was advised it was reasonable and legal for him so to do. He does not presume to take upon him to judge absolutely of the facts charged upon parties against whom a prosecution is intended, but he must discharge his duty with caution; with a

due regard to the honour of the crown, and the safety of the subject; and therefore he is not to be driven precipitately to trials: And he is persuaded the court will not think it reasonable to interpose immediately upon the request of private parties, as if they were the judges of the proper season when the public laws ought to be put in execution. In respect whereof, he hoped the court would either refuse the petition, or at least delay giving any injunction concerning the matter for a reasonable time, and until his Majesty's Solicitor be further heard."

The above is taken from a written copy of the petition and answers, which I found in a collection of criminal papers made by a gentleman who was one of the crown-lawyers in 1726; but I cannot find any thing in the record relative to this matter. This may be owing to an error in the dates of the copies I had, or perhaps to the matter being transacted before judgement was given.

N^o 75. p. 299. *Case of Halladay, 1767. Perjury.*

See the case of Mr James Row minister at Monyvaird, Aug. 9. 1665, and different diets afterwards; MS. Abst. ii. 204. *et seqq.* This case is but imperfectly stated by Mackenzie, tit. *Perjury*. See, too, Mr John Biltoun's case, Nov. 9. 1658; MS. Abst. i. 463. 464. 469. In this last case the libel was laid on Q. M.'s act. It was sustained, but he was affoizied by the jury. See, too, the case of Margaret Wood, Feb. 23. 1631. It was not judged, but there are long pleadings; MS. i. 332. 333. *et seqq.*

October 28. 1715, George Montgomery was indicted, at the Advocate's instance, for perjury; and the fact charged was, That he, at a meeting of his father's creditors, did declare openly, publicly, and audibly, that he agreed and consented they should have a preference upon his father's estate, real and personal, waving any title he had to a preference by his marriage-settlement, or otherwise, as appeared from the federunt and written minutes of the said meeting, and will more fully appear by the proof to be led in this cause; at least he, at that meeting, did openly agree and consent in words to the above purpose: and yet he did thereafter, in presence of one of the Lords of Session, judicially swear, depone, and affirm, upon his solemn oath, that at the said meeting he did not consent to any preference in favour of his father's creditors; which judicial oath is subscribed by him and the judge, in the clerk's hands.

Pleaded

Pleaded for the pannel, 1st, The charge being founded upon a judicial oath, not yet advised by the court before which it was emitted, the import of it is not known : and as the creditors have prayed for a re-examination of the pannel, on account of some uncertainties in his oath, if that be allowed, he will have an opportunity to explain himself, and add circumstances from recollection, which will take off any suspicion of perjury. 2^{dly}, Perjury cannot be inferred from an oath emitted on a reference ; *l. 1. et 2. C. De reb. cred.* And it appears from a decision in 1677, observed by Mackenzie in his Criminals, tit. *Perjury*, that witnesses cannot be pursued for perjury upon the depositions of other witnesses. 3^{dly}, The oath founded on has this limitation, “in so far as he remembers ;” therefore perjury cannot be inferred from it, as want of memory cannot be criminal : And although it be not presumeable that one will forget a solemn fact, yet a transitory act, or an expression, may at some distance of time escape the memory. 4^{thly}, The libel is not relevant, because the precise terms of the words of the promise or agreement libelled, are not set forth, which should have been done, that the pannel might have been heard upon the import of them ; and witnesses ought not to be allowed to be examined upon their notions and imaginations as to what he said, seeing they may readily have mistaken his meaning. For which reason, 5^{thly}, our law does not allow a promise to be proved by witnesses even *ad civilem effectum*. 6^{thly}, The place is not libelled where either the promise or oath were emitted, which ought to have been done ; Mackenzie, tit. *Libels*, § 2. *l. 3. ff. De accusat.*

Answered to the 1st, Criminal prosecutions do not depend on civil actions. This pursuit is *ad vindictam publicam*, and has no connection with the civil cause, which may be transacted or dropped by the private party. The promise and oath libelled are both clear, and the court and jury can very well judge of them. To the 2^d, In a pursuit *ad vindictam publicam*, the law does not distinguish between the different kinds of oaths. If a lie be judicially affirmed upon oath, perjury is committed. An oath upon reference puts an end to the civil question ; but a criminal prosecution for perjury is still competent ; *l. 21. 22. ff. De dolo malo*. As to the law quoted from the Code, the first agrees with the Pandects, and the other may be understood of the case in which *perjuratum quodam colore* ; and the Code does not derogate from the Pandects, excepting fifty constitutions of *Justinian* ; and Mackenzie refutes this pretended distinction. This case differs from that of witnesses. If two witnesses depose one way, and two another, there is no way of knowing which set has spoke

spoke the truth. To the 3^d, The quality of *non memini* will not *in facto proprio* save from the imputation of perjury, especially as to a recent fact; and that quality is not added to the part of the oath libelled on. To the 4th, The words are sufficiently specified in the libel; and it will be considered, whether the agreement libelled has been made out by these, or other words directly to that purpose. To the 5th, That in this case, a minute is produced, which will support the depositions of witnesses, and render them more circumstantial, by assisting the memory: And in criminal matters, witnesses are admitted to prove emissions of words, such as verbal injuries, blasphemy, &c.; and all the pannel's argument can infer is, that the proof must be clear, without any darkness or doubt; of which the jury will judge. To the 6th, This crime does not consist in one act; and the place, so far as necessary, is sufficiently qualified, viz. that the promises were made at a general meeting of the creditors, and the oath emitted before Lord Couper, at the ordinary place of deposing, judicially.

The court found, "The pannel his having in manner libelled, openly, publicly, and audibly, promised, agreed, or consented, to the preference of his father's creditors, to all pretences he had to his father's estate, real or personal, by his marriage-settlement, or any other manner of way whatsoever; or the said pannel his agreeing, or giving consent, to give preference to his father's creditors, exclusive of his own pretensions to his father's means and effects, by openly declaring his consent in these terms, or in other words and expressions to the same purpose; and his having judicially upon oath denied, or contradicted the same, relevant to infer the pains of perjury: and repelled the haill defences proponed for the pannel, and remitted," &c. Afterwards the pannel set forth, That he was a landed man; which he proved by his infestment; and objected, there was not a sufficient number of landed men cited to be on the jury. The diet was deserted *simpliciter*. Abridg.

N^o 76. p. 308. *Case of Joseph Taylor, 1767.*

November 18. 1617, Mr John Muirhead notary in Tweedmouth, indicted for forgery and perjury. Alledged for the pannel, "He is a stranger, having lived for many years in England; and therefore this is not *forum competens*, but he ought to be remitted to the judges in England, conform to the act of parliament. *Ans.* The act quoted concerns only persons living in England, and fugitate, cited for slaughter, and certain other crimes; of which the crime libelled

libelled is none. The pannel came willingly to Scotland to be a witness.—The Justice, notwithstanding the alledgeance, remits, &c. Upon this the Abridger observes, “It is probable the crime was committed in Scotland, else it would seem the declinature was well founded: and by the dittay it appears, both the forgery and perjury were committed in Scotland; the perjury before the Lords of Session, by his falsely swearing in their presence the deed to be a true deed, and the next day acknowledging the same to be false.—He was convicted, and sentenced to be hanged. MS. Abst. i. 302.

See, too, Alexander Pearson’s case; in which the offence libelled against him, Lord Ochiltree, and others, leasing-making, and slanderous speeches against certain noblemen, was committed in England. He urged, That supposing the fact charged not to be criminal in England, it would be contrary to all law and justice to punish him in any other place, on pretence the fact was criminal in the country where he was tried. The diet was continued from time to time, and at last deserted with the Advocate’s consent.—A full account of this case is given in Rushworth’s Hist. Collect. MS. Abst. i. 343. 344.

In 1769, or 1770, it is informed, a Scotchman was indicted at Carlisle for stealing a horse in Scotland which he had brought to England; but the judges found they could not try him.—This case, it is said, gave rise to the act 13th Geo. III. “for the more effectual execution of the criminal laws in the two parts of the “united kingdom.” This act is imperfect; for it provides no method for compelling witnesses residing in the one country to go and give evidence in the other. A statute ought to pass, obliging people living in England to appear, and give evidence before commissioners appointed by the court of session for taking proofs there. In a cause depending at present before the court of session, it was necessary for one of the parties to examine several English manufacturers. The court granted a commission for that purpose; but the witnesses refused to appear. The lawyers here, imagining the court of king’s-bench, or the Chancery, could give relief in such a case, directed the advice of English counsel to be taken upon the proper remedy: they were consulted accordingly; but answered, They knew of no precedent for compelling witnesses in such a case to appear and give evidence. We pay more respect in this country to English commissions.

N^o 78. p. 372. *Case of Janet Nicol, 1767.*

In one case, a reduction was attempted before the court of justiciary.—
March 7. 1680, Alexander Strachan of Glenkindy having been apprehended for slaughter, became bound in a bond of compearance for himself, and such of his tenants and servants as should be cited as parties or witnesses, under a penalty of L. 20,000 Scots. Some of them not having appeared, the bond was declared forfeited; and the forfeiture was gifted to Sir Adam Blair; who adjudged Mr Strachan's estate. He brought a reduction of the bond before the Lords of Justiciary; and upon a petition for him, the Lords having considered the process of reduction, and petition, refused the desire of the petition, but prejudice to him to apply to the parliament, or otherwise, for remeid, as accords.

This is taken from a note of cases made upon a search in 1765, when the question, as to the competency of appeals from the justiciary, was in agitation.

N^o 80. p. 472. *Case of John Raybould, 1768. Forgery.*

Had this plea been kept up till the prosecutors had concluded their proof, and then been urged to the jury, it would in all probability have saved his life: but it did not occur to his counsel till after the indictment was begun to be read. From their not having time to deliberate, it was offered prematurely. It is surprising, that it should have been overlooked in all former cases. Care has always been taken since, by the prosecutors of this crime, to serve a list of witnesses upon the pannel that can prove the identity.

N^o 81. p. 474. *Case of James Archibald, 1768.*

Lord Royston, in his MS. notes on Mackenzie, p. 239. observes, "Tho' regularly these interlocutory sentences are final, the forms not allowing reclaiming; yet there are several precedents, by which, upon new suggestions and arguments, interlocutors have been altered, as Feb. 2. 1674, Affint's case; Nov. 19. 1674, Rutherford; Feb. 5. 1683, Laurie; June 29. 1691, Fyfe; Aug. 3. 1691, Keith; Aug. 5. 1692, Captain Wallace; in which case the question

tion was argued, Whether, in form, there could be any pleadings on the relevancy, either of the libel or defences, after signing the interlocutor? and the court allowed them to plead; and thereafter they pronounced a new interlocutor. The like in Barclay's case, Nov. 12. 1668."

N° 82. p. 483. *Case of James Steven, 1768.*

In the case of Irving for breaking prison, July 26. 1673, it was objected by the lawyers for the pannel, "That the dittay is not relevant; because, though
" it be founded on the common law and practick of this kingdom, yet it con-
" descends upon no law, whereupon either the crime or pains libelled can be
" inferred; and seeing it is only subsumed, that the pannel was in prison for
" a civil debt, there is no law, common or municipal, can be adduced to
" infer the crimes and pains libelled."

The Advocate replies, "That the dittay is opposed, which is most relevant,
" without condescending on any laws in the proposition: for the law is, and
" ought to be, known to the judge; and a dittay is *relevant without a pro-*
" *position*; and the crime contained in the proposition, viz. breaking the
" King's prison, and robbing his Majesty of his prisoners, is a crime so noto-
" rious, that there needs neither a proposition nor a condescending on parti-
" cular laws, the common law, and law of nations, being so unquestionably
" clear as to the same." MS. Abst. iii. 251. 252.—Sir George Mackenzie for
the pannel, in his duply, does not controvert this.

The following aphorism of Beccario is a panegyric on the syllogistical form of our indictments: "In omni delitto si deve fare dal giudice un syllogismo
" perfetto; la maggiore deve essere la lege generale: la minore l'azione con-
" forme, o no alla legge; la conseguenza, la liberta, o la pena." *Dei delitti e delle pene*, § 4. ed. 1772.

In this case of Steven, and others, it was further argued for the pannel, That in case the libel were sustained, the prosecutor must either divide the trial, or allow some of the persons whose names he had thrown into the libel, to be examined as witnesses for the rest; according to Mackenzie's Criminals, tit. *Exculp.* § 11.

I do not remember the answer for the prosecutors, further than that they insisted the demand was unprecedented.

There was no occasion to determine this point; but the judge, in delivering his opinion, said, he thought the demand reasonable, and that he remem-

bered a case in which it had been granted.—The case alluded to was, I imagine, a trial for a riot and battery at Stirling in 1748. It gave rise to mutual processes; in each of which there was a number of defenders: and, 4th July 1748, the diet was of consent deserted against one on one side, and three on the other, that they might give evidence.—As this was done of consent, it cannot properly be referred to as a precedent; though probably the consent was owing to the opinion of the court. A prosecutor surely ought not to be allowed to deprive a pannel of his witnesses, merely by throwing their names into the libel; and therefore, when it appears from circumstances that such may be his views, or that such may be the consequence if the trial be not divided, it either should be so, or the court be admitted as witnesses for one another.

This question was agitated in a process brought before the court of session, in 1768, by Peter Williamson, against several people in Aberdeen. It was a reduction of a decree arbitral; but he called as parties, not only those in whose favour it was pronounced, but the arbiter, and two procurators in Aberdeen, by whose mal-practices he alledged it had been obtained, and concluded against them for damages.—Those in whose favour the decree was, alledged, that he had made the two procurators parties, in order to prevent their examination as witnesses for the other defenders; and therefore they insisted, either that he should first discuss these two, or that they should be admitted to give evidence.—The Lord Ordinary allowed their depositions to be taken; but ordered them to be sealed up, and not opened but by authority of the court. In this judgement the pursuer acquiesced.

This question was again considered, and received a determination, in the case of Margaret and Agnes Adams, two young girls, (one of them about twenty, the other about sixteen), brought to trial last winter for the robbery and murder of an old woman who kept a shop in Glasgow. The counsel for the youngest offered to prove by the eldest, that the youngest had no concern in the affair, and he insisted he should be allowed to adduce her, as she was a necessary witness, there being, according to the shewing of the indictment, no other person present. But the court refused to admit her; and all the judges were of that opinion save one. It is not however to be supposed the court thought, that in no case whatever could one pannel be witness for another. The solution of this question seems to depend upon circumstances. If there be reason to presume, or suspect, from circumstances, that the prosecutor has thrown the names of some persons into the indictment with no other view than to deprive the rest of the pannels of their evidence, he ought to be disappointed.

Other

Other cases too might perhaps be figured, in which this demand should not be refused.

No 84. p. 505. *Case of Mungo Campbell, 1769. Murder.—Challenges.—Suicide.*

A gentleman who was some years ago tried at a circuit for an assault, lately informed me of a circumstance in his trial, which will manifest the necessity of admitting *peremptory challenges*. In the list of forty-five jurors served upon him along with the criminal letters, he observed the name of a man with whom he had been long on very bad terms, and therefore had great reason to wish he should not be upon his jury, though he was averse to challenge him. Having mentioned this to his counsel, he, the night before the trial, waited upon the judge, and told him the case. The judge said, he would think of it, and make inquiry about the man. Next morning he acquainted the counsel, that he was assured this man was a very intelligent person, and very proper to be put upon the jury. The counsel repeated the objection, but without effect. Upon which he signified, that he would challenge him, as several circumstances that indicated enmity against the pannel could be proved against this man. However, when the matter came to the push, from dread of irritating, and other reasons, the challenge was not made; and this man was sworn one of the fifteen. The consequence was fatal to the pannel. All the rest of the jurors, or at least a great majority of them, were for acquitting the pannel; and a vote passed to that purpose. Upon which this man fell to work, and by various means prevailed on the jury to alter, and sign a verdict contrary to their first opinion. This he accomplished by the great influence he had over them; which was owing to his being a man of superior rank and abilities, and to his being factor upon the estate of a great Lord in that part of the country, whose tenants the rest of the jurors were.

Some thought Campbell made away with himself too soon. He should (they said) have taken the chance of another petition of appeal, and in case that failed, made application to the crown. His petition to the King in common course fell to be remitted to the crown-lawyers, and, from the English opinions, he had reason to expect a favourable report from them. Perhaps he was too precipitate. But he was persuaded, as already said, from the very first, that he would be condemned to die; and with reason; for the high rank, and high character, of the man he slew, could not fail to raise unconquerable

prejudices against his cause, though it had been clearer than it was. Besides, he expected to be put in irons next day; and fetters, it is plain, must have rendered it difficult for him to rid himself of life. This last consideration, however, was not sufficient: for to a man who had so thoroughly surmounted the fear of death, and was resolute to die, *moriendi mille figura*;

“Nor stony tower, nor walls of beaten brass,
 “Nor airless dungeon, nor strong links of iron,
 “Can be retentive to the strength of spirit;
 “But life, being weary of these worldly bars,
 “Never lacks power to dismiss itself.” SHAKESP.

Man is not the only animal that seeks relief from misery by voluntary death. “Dans le peril (says Muller) le scorpion est très rusé, courageux, et brave le danger. Mais quand il est réduit au desespoir, et qu’il a perdu toute esperance d’échaper, *il se tue alors lui-même*. C’est de quoi on peut faire l’expérience en faisant un cercle de braise ardente, et en posant le scorpion dans la place vuide du milieu. Il fait alors toutes les tentatives possibles pour se tirer de cette braise, et court tout autour du cercle pour trouver une issue; mais le succès trompant toutes ses esperances, il retourne se placer au milieu de la place vuide, recourbe sa queue en haut, et ne cesse de se donner des coups de son éguillon, dans la tête et dans le corp, que quand les forces lui manquent, et qu’il meurt. Il fait la même chose quand on l’attache sur une table avec une épingle; et il a cela de commun avec quelques autres insectes, dont le nombre n’est pas grand.” *Délices physiques choisies*, à Nuremberg 1767, tom. 2. p. 6.

The *lemmer*, or rabbit of Norway, is likewise said to be *un animal suicide*. See *Melanges intéressants et curieux*, tom. 2. p. 52.

If any of the above particulars be true, it might afford a rhetorical argument in justification of suicide, as plausible as many a one that has been urged. “Go to the ant, thou sluggard, consider her ways, and be wise.” But the last rests upon the single attestation of Reynard; and the first, or rather the inference from it, is controverted by some. They say the scorpion, when distressed as above, retires to the middle place, because it is the coolest; and that the strokes he seems to give himself are not voluntary, but the convulsions of death. The fact is denied altogether in the *Encyclop.* voce *Scorpion*, upon a single experiment of Maupertuis.

N^o 90. p. 595. *Case of Macgregor, 1773. Vicennial prescription of crimes.*

P. 606. *Claim for the jus relictæ, at the instance of the widow's executors, repelled at the distance of twenty years.*

The case here alluded to is, I imagine, that of George Tod against Andrew Inglis, determined by the court of session 27th February 1770.—I was in the cause, and I see from a note, that some of the judges went upon the taciturnity, and some upon the insufficiency of the evidence, as to the value or extent of the goods in communion at the husband's death. The interlocutor was expressed (inaccurately) as follows. “In respect of the long taciturnity, and other circumstances of the case, find, That the charger (Tod) must astruck his claim by proper evidence; and as he has produced no such evidence, therefore suspend the letters *simpliciter*, and decern;” (i. e. reverse the judgement of the inferior judge, who had determined for Tod.)

As a contrary opinion was given by some of the judges not many years ago, in Mr Dempster's case, (see p. 462.), I have, I believe, committed a mistake in taking down the first opinion in that case, so far as it respects this point. My note bears, “But as it is a consequence of this, that persons may be brought to trial at a great distance of time, judges bound to take care,” &c.

But upon looking into a note taken by another counsel in that case, I find he has taken down that part of the opinion thus. “Think it actionable, but, as circumscribed by no time, are called upon to see that the accusation, as laid in the libel, be strictly regular.” These opinions upon this point were given but collaterally in Mr Dempster's case; and I take notice of them here, only to apologize for presuming to differ from the judgement in this case.

As to the authority of the Roman law in this country, it would probably be found upon inquiry, that it was seldom if ever resorted to before our courts, till the institution of the College of Justice in 1537. Be this as it may, it is indisputable, that our judges have differed from it in innumerable particulars, both as to civil and criminal matters.

TWO NOTES OMITTED.

N^o 29. p. 57. *Case of W. and J. Baillies, 1715. Egyptians.*

A very curious paper taken from the record of the Privy Seal, b. 14. f. 59.

James, be the grace of God, King of Scottis: To our sheriffs of Edinburgh, principal, and within the constabulary of Haddington, Berwick, &c. provosts, aldermen, and bailies of our burrowes, and cities of Edinburgh, &c. greeting. Forasmuch as it is humble meanit and schawin to us be our lowite Johnne Faw, Lord and Erle of Litill Egypt, That quhair he obtaint our letters under our grete seile, direct to zow, all and sundry our said sheriffs, stewartis, bailies, provosts, aldermen, and bailies of burrois, and to all and sundry oyris havand autorite within our realme, to assist to him in the execution of justice upon his company and folkis, *conforme to the lawis of Egypt*, and in punishing of all yame that rebellis against him: nevertheless, as we saw informit, Sebastiane Calou, Egiptiane, and of the saids John's company, with his complices and partakaris underwritin, yat is to saye, Antean Dorea, Satona Fingo, Nona Finco, Philip Hatfeyggow, Jowla Bailzou, Grafta Neyn, Gileys Bailzou, Bernard Beige, Demer Mackalla, Norfaw Cawlour, Martyn Femine, rebellis and conspiris against the said Johnne Faw, and hes removit yame all uterly out of his company, and takin fra him divers sounes of money, jewellis, claiths, and oyris gudis, to ye quantite of ane grete soun of money, and on na wyfs will pass hame with him; howbeit he has bidden and remanit of lang time upon yame, *and is bunding and oblest to bring hame with him all yame of his company yat ar on live, and ane testimoniaie of yame yat are deid*; and als ye said Johnne hes the said Sebastiou's obligatioun, maid in Dunfermling befor our master housald, yat he and his company suld remane with him, and on na wyfs depart fra him, as the famin beiris; incontrar ye tennor of ye quhill, ye said Sebastiane, be sinister and wrang informatioun, fals relatioun and circumventioun of us, hes purchest our writings, discharging him, and ye remanent of the personis above writtin, his complices and partakaris of the said John's company, and with his gudes takin be yame fra him, causes certane our lieges assist to yame and yair opinionis, and to fortify and tak yair pairt against ye said Johnne, yair lord and maister; sua yat he on na wyfs can apprehend nor get yame, to have yaim hame againe within yaire awin

awin cuntre, eftir the tenour of his faid band, to his hevy dampnage and fkaith, and in grete perell of tynfall of his heritage, and expres agains justice: Our will is heirfor, and we charge zou ftraitle, and commands, yat, incontynent yir our letters fene, ze, and ilk ane of zou, within ye boundes of zour offices, command and charge all our liegis, yat nane of yame tak upon hand to refet, affist, fortify, fupple, manteine, defend, or tak pairt with, the faid Sebaftiane and his complices above writtin, for na buddes, nor oyr way, agains the faid Johne Faw, yair lord and maifter; bot yat yai, and ye, in likewys tak and lay handis upoun yame quharevir yai may be apprehendit, and bring yam to him, to be punift for yr demeritis, conforme to his lawis; and help and fortify him to punifh and do justice upoun yame for yair trespaffis; and to yat effect, let to him zoure prefonis, ftokis, fetteris, and all oyr thingis neccellar ynto, as ze, and ilk ane of zow, and all oyris oure liegis, will answer to us yrupoun; and, under all hieaft pane and charge yt eftir may follow; fwa yat the faid Johne have na caufe of complaynt heirupoun in tyme cuming, nor to refort to us agane to yt effect, notwithstanding ony oure writings finifterly purchest, or to be purchest, be the faid Sebaftiane in the contrar. And als charge all oure liegis, yat nane of yam moleft, vex, inquiet, or trouble, ye faid Johne Faw and his cumpany, in doing of yair lefull beffynes, or oyrwayis, within our realme, and in yair paffing, remanyng, or away-ganging furth of ye famin, under the pane above writtin; and ficklelike, yat ye command and chaarge all fkipparis, maifters, and marinaris, of all fchippis within our realme, at all portis and havyns quhair the faid Johne and his cumpany fal happin to refort and cum, to refave him and yame yrin, upoun yair expenses, for furing of yame furth of our realme to the partes beyond fey; as you, and ilk ane of yame ficklelike, will answer to us yrupoun, and under ye paine forfaid. Subfcrivit with oure hand, and under our prive feile, at Falkland, ye fiveteine day of Februar, and of our reigne the xxviii zeir.

Subscript. per Regem.

There is a writ of the fame tenor in favour of this Peer from Queen Mary, fame record, 25th April 1553; and 8th April 1554, he gets la remission for the slaughter of Ninian Small.

N^o 40. p. 75. *Case of Macminn. 1730. Verdict suspended.*

It was further observed by the counsel for the suspender, "In the case of George Graham, observed by Mackenzie both in his Criminals and Observations, the council, without any summons of error, reduced, as unjust, the sentence whereby he was found guilty art and part of theft." This they argued, "Supposing, for once, that the fault could only have been imputed to the jury."

The answer to the suspender's objection to the relevancy of the libel was as follows. "The same would appear most groundless, if it were considered, that the pannel was indicted as guilty of theft. The subsumption, or "In so far as" did not indeed bear the pannel directly stole the anvil; but it did what was equivalent; it recited the circumstances from which the guilt was inferred.—Libels did indeed bear ordinarily in the subsumption, "True it was" the pannel stole the thing; then proceeded to an "At least," and charged such and such circumstances as separately inferred a relevancy; and that was indeed the case almost in all indictments."

The suspender complains likewise in his bill, that the steward had allowed surgeons and butchers to pass upon his assize; which was contrary to the practice of the justiciary. No other answer was made to the objection, That an exculpatory proof had been refused, than it was not demanded till the day of the trial.



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